TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 391

JOSEPH B. BRUNER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 1, 1951.

CERTIORARI GRANTED OCTOBER 22, 1951.

SUPREME COURT OF THE UNITED STATES

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INDEX

1 2 [Caption omitted]

3 In United States District Court for the Macon Division of the Middle District of Georgia

Civil Action No. 570

JOSEPH B. BRUNER, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT

COMPLAINT—Filed March 23, 1948

To the District Court of the United States for the Macon Division of the Middle District of Georgia; and to the Honorable T. Hoyt Davis, Judge thereof:

The petition of Joseph B. Bruner respectfully shows:

(1)

The petitioner is a resident of Bibb County, Georgia, within this Division and District.

(2)

This Court has jurisdiction of the parties hereto and the controversy herein presented under the provisions of paragraph 'Twentieth' of Section 24 of the Judicial Code, as amended.

(3)

This action is brought by the petitioner against the United States of America to recover from its moneys owed to the plaintiff as compensation for services rendered as an employee of the defendant.

(4)

Petitioner was employed by the defendant for the period of time, March 11, 1941 to and including September 15, 1944, and during such employment was a civil service employee classified in the grade of CAF-9.

4 5

During said period of employment, and for that portion of the same within the statutory period of limitations governing the bringing of this action, the defendant failed and refused to pay your petitioner for hours of work performed by him, although the defendant was required to make such payments under the terms of applicable statutes, regulations and executive orders

properly passed, promulgated and ordered by authorized agents, agencies and executives of the defendant.

6

By reason of the facts stated the defendant is indebted to your petitioner in the amount of $9,000.00.

7

Despite repeated protests made by your petitioner to the defendant that he was being ordered and required to work many additional hours for which he was not being compensated, no action was taken by the defendant to alleviate the situation.

9

Despite demands of the plaintiff for payment for additional hours of work the defendant fails and refuses to accede to such demands.

WHEREFORE, your petitioner prays for judgment, upon the law and facts of the case made, against the United States of America, in the sum of $9,000.00.

THOMAS W. JOHNSON,
Macon, Georgia.
ELLSWORTH HALL, JR.,
Macon, Georgia.

HALL & BLOCH,
Macon, Georgia,
Of Counsel.

5 *Duly sworn to by Joseph B. Bruner. Jurat omitted in printing.*

6 Proof of service and acknowledgment thereof (omitted in printing).

7 In United States District Court

[Title omitted]

ANSWER OF THE UNITED STATES—Filed July 12, 1949

Now comes the United States of America, defendant in the above matter, and without waiving its motion to dismiss heretofore filed, but especially insisting on both grounds of said motion, files this answer to the complaint of the plaintiff.

1

Defendant admits Paragraph One of Plaintiff's complaint.

2

Defendant denies Paragraph Two of Plaintiff's complaint.

3

Paragraph Three of plaintiff's complaint requires no answer, but defendant shows that the only services ever rendered the defendant by the plaintiff were as an officer of the United States.

4

In answer to Paragraph Four of plaintiff's complaint, defendant shows that on March 11, 1941, the plaintiff was given a probational appointment as fire chief at a salary rate of $3200.00 per annum, and his services were to be rendered the War Department, Quartermaster Corps, Camp Wheeler, Georgia. The salary of the plaintiff was subsequently increased to the rate of $3300.00 per annum, and his Civil Service classification or grade was CAF-9. Defendant further shows that plaintiff's appointment as an officer of the United States was made under the procedure set out in the
8 defendant's exhibit to motion to dismiss which was filed in this case on February 3, 1949, and which is part of the record in this case. Defendant hereby adopts said exhibit as part of this answer the same as if said exhibit were set out in full in this paragraph. Plaintiff resigned his position on August 24, 1944.

5

Defendant denies each and every allegation contained in Paragraphs Five, Six and Seven of plaintiff's complaint.

6

In answer to Paragraph Nine of plaintiff's complaint, defendant shows that plaintiff was never required to work overtime or in excess of the hours provided in his employment agreement. However, all of plaintiff's complaints and demands regarding the treatment afforded him, all of plaintiff's complaints and demands regarding the treatment afforded him, although without foundation and not meritorious, were always received and considered when presented to the proper authorities of defendant; and defendant further shows that the entire claim of plaintiff was thoroughly and carefully considered by the Comptroller General of the United States before this complaint was filed.

7

Further answering, defendant says that it has paid plaintiff all money which plaintiff has earned and to which plaintiff is entitled,

and defendant specifically denies that it is indebted to plaintiff in any respect.

WHEREFORE, defendant having fully answered prays that judgment be rendered in favor of the defendant, and that costs be taxed against the plaintiff.

JOHN P. COWARD,
United States Attorney.
By: JAMES H. FORT,
Assistant United States Attorney.

9 In United States District Court

[Title omitted]

FINDING OF FACT AND CONCLUSIONS OF LAW

Preliminary Statement

This case came on for trial before me at Macon, Georgia, commencing on May 8, 1950, and being concluded on May 9, 1950. The action was brought by the plaintiff for alleged overtime pay due him by the defendant for services the plaintiff rendered the defendant on a civil service fire chief and fire fighter during the war at the army installation at Camp Wheeler, Georgia. The plaintiff claimed that this court had jurisdiction of the case under the Tucker Act (28 USC, Section 1348 (d) (2)). The defendant filed a plea to the jurisdiction and a motion to dismiss on the ground that plaintiff's complaint failed to state a cause of action upon which relief could be granted. The defendant moved for a more definite statement of plaintiff's case and after a hearing on the matter the pleadings were perfected. Both sides produced a number of witnesses and considerable documentary evidence and from that I find the facts to be as follows:

Findings of Fact

1

Joseph H. Bruner was given a probational appointment of the position of fire chief on March 31, 1941. His appointment was made pursuant to his qualification under a civil service examination and his post of duty was Camp Wheeler, Georgia. His initial salary was $3200. per annum, which was raised to $3300. subsequently. Bruner continued in his position as fire chief until August 24, 1944, when he resigned because of his dis-satisfaction with the working conditions. The plaintiff offered no evidence concerning the nature of his appointment except that it was made by the Civil Service Commission. The defendant filed an affidavit of A. H. Onthank, Director of Civilian Personnel, Department of the Army, in which he set out

the nature of this appointment. There being no evidence to
10 the contrary, this court finds as a fact that the appointment of Mr. Bruner was made in the manner as set out in the affidavit of A. H. Onthank, but the court is not bound by any conclusions which Onthank states. "The plaintiff was appointed by the Secretary of War pursuant to Article II, Section 2, Clause 2 of the Constitution."

I find that the plaintiff as fire chief at Camp Wheeler was required to be "on call" 48 hours and off duty 24 hours. During the period of "on call" duty the plaintiff was required to remain at the fire station and was kept busy a good part of the time supervising training, answering fire calls, etc. The plaintiff was unable to establish to any degree of certainty the portion of the 48 hour "on call" duty which was devoted to actual work. During the 48 hours the plaintiff did have time for food, rest and relaxation," but he was during the 48 hour period in a "stand by" or "on call" duty.

The plaintiff was paid additional compensation in lieu of overtime in accordance with the statutes and regulations. These regulations, provided a percentage of an employee's base pay in lieu of overtime pay when the employee's hours of duty were intermittent or irregular. These applicable statutes and regulations were brought out at the trial and plaintiff's pay roll records show that he was paid the amounts provided by these regulations. The plaintiff was not paid any overtime pay for actual overtime hours as such.

During all the time plaintiff continued to accept the amounts paid him by the government and although he made several complaints to the army officer in charge of the fire station, Bruner never did communicate his complaint to the Commanding Officer or any higher authority. In January of 1946 the plaintiff filed his claim with the War Department and the General Accounting Office, which claim was carefully considered and reconsidered and finally denied in December of 1947. The plaintiff filed the complaint in this case on March 23, 1948.

11 CONCLUSIONS OF LAW

This Court Does Not Have Jurisdiction

This court does not have jurisdiction of this case as the plaintiff was an officer of the United States within the meaning of the Tucker Act (28 USC, Sec. 1346(d)(2)). Plaintiff was appointed pursuant to the statutes and regulations as set out in the affidavit of A. H. Onthank, Director of Civilian Personnel, Department of the Army, said affidavit being a part of the record in this case as an exhibit to defendant's motion to dismiss. I feel that this court is bound by the decision of the Court of Appeals for the Fifth Circuit in the case of *Kennedy* v. *U. S.*, 146 F. 2d 26.

If This Court Had Jurisdiction Plaintiff is Not Entitled To Recover On the Merits

Although this court has definitely found that it does not have jurisdiction of this case, in view of the fact that this trial lasted two full days and the evidence was very comprehensive the court feels that it should go ahead and make Findings and Conclusions on the merits also.

The plaintiff is not entitled to recover as the evidence shows that under the applicable statutes and regulations and rules and under the practices prevailing at Camp Wheeler as promulgated by the Commanding Officer, the plaintiff was paid the money he was entitled to receive. The plaintiff was entitled to the money paid him "in lieu of overtime", but was not entitled to the overtime pay as was paid many other regular hourly government employees. The plaintiff's position was one excepted from the regular overtime pay acts.

3

The plaintiff has failed to establish that he is entitled to recover an exact or definite amount and the evidence in this case does not disclose any definite sum, and if the plaintiff were otherwise entitled to recover there is no basis upon which the court could make an award. The plaintiff has not submitted any legal formula or guide to the court to determine any amount.

12 Any and all rights which the plaintiff had or might have had to recover any overtime pay have been waived by him by acceptance of the pay which was tendered to him and accepted by him over the period of time for which he worked at Camp Wheeler, and he is now estopped to complain of the failure to pay for his own laches.

5

Judgment should be rendered in favor of the United States for the reasons set out in the foregoing conclusions. A judgment in accordance with these Findings and Conclusions should be prepared and submitted to the court for entry.

This the 23rd day of May, 1950.

(S.) A. B. CONGER,
United States District Judge,
Macon, Georgia.

13 In United States District Court

[Title omitted]

JUDGMENT—Filed June 7, 1950

The Court having determined that it is without jurisdiction in this case, the complaint of the plaintiff is hereby dismissed. It is further ordered that court costs in this matter be taxed against the plaintiff, Joseph B. Bruner.

Entered at Macon, Georgia, this 23rd day of May, 1950.

(S.) A. B. CONGER,
United States District Judge.

Presented by:
(S.) JAMES H. FORT,
Asst. United States Attorney.

14-20 In United States District Court

[Title omitted]

NOTICE OF APPEAL—Filed July 21, 1950

Notice is hereby given that Joseph B. Bruner, the plaintiff in the captioned matter, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this case by the Honorable A. B. Conger, Judge, on May 23, 1950.

(S.) DENMARK GROOVER, JR.,
Attorney for Plaintiff,
614 Persons Building,
Macon, Georgia.

HALL & BLOCH,
614 Persons Bldg.,
Macon, Ga.;
DENMARK GROOVER, JR.,
Persons Building,
Of Counsel.

21-22 Clerk's Certificate to foregoing transcript omitted in printing.

23 In United States District Court

[Title omitted]

Before: Honorable A. B. Conger, United States District Judge
At Macon, Georgia, May 8-9, 1950

TRANSCRIPT OF EVIDENCE

24 COLLOQUY

The COURT: The first case on the calendar for trial is that of Joseph B. Bruner v. The United States. What say ye for the Plaintiff?

Mr. GROOVER: The Plaintiff is ready, if Your Honor please.

The COURT: What say ye for the Defendant?

Mr. FORT: The Defendant is ready, but we would like to restate briefly our motion, which the Court has already heard, to be sure our contentions are in the record before we proceed to trial.

The COURT: Very well. You may do so.

Mr. FORT: We renew our motion now that the Court has no jurisdiction under the Tucker Act; that the Plaintiff was an officer of the United States within the meaning of the Tucker Act; the Court of Claims offers him adequate remedy and the sole remedy provided by law; that any consent to be sued by the Government must be strictly construed that the burden of establishing jurisdiction is on the Plaintiff. He has never done that at any time. The Court cannot assume jurisdiction and the Court cannot confer jurisdiction. If jurisdiction does not exist, we cannot confer it by consent.

We take the position that it is the duty of the Plaintiff, any time he is in the United States Court, to establish jurisdiction. I believe that Your Honor stated, when this matter was heard in
25 Americus on motion, that you would hear evidence at the same time as to the jurisdiction.

The COURT: Mr. Fort, it strikes me that the question of whether or not the Plaintiff in this case was an officer is a question of fact. I cannot say from the pleadings—and I may not be able to say with any degree of certainty at any stage—whether he was an officer or whether he was not an officer. My understanding is that if he was an officer, then, of course, this Court has no jurisdiction.

Mr. FORT: In fairness to the Court, I want to call attention to a case now pending in the Sixth Circuit from Kentucky——

The COURT: Dealing with this particular question?

Mr. FORT: Yes, sir. The District Judge in Kentucky held that he did have jurisdiction, that a fire fighter was an employee, not an officer, but that same Judge——

The COURT: Is that a brief or what is that you have in your hand?

Mr. FORT: This is the Government's brief in that case which is pending in the Sixth Circuit. The District Judge held jurisdiction, but throughout he held the Plaintiffs were not entitled
26 to recover on the merits. There were a number of plaintiffs in that case suing for a combined amount, I believe, in excess of $37,000.

The COURT: Were they fire fighters?

Mr. FORT: They were fire fighters at an Army installation. We do want to read you our plea to the jurisdiction, and our second defense: that the Plaintiff has not stated a cause of action in the complaint; that he has not stated any acts upon which relief can be granted. We say that the case is controlled by the Conn case reported in the Court of Claims.

The COURT: You are now dealing with that portion of your motion that does not apply to lack of jurisdiction but that the petition does not state a cause on which relief can be granted; is that right?

Mr. FORT: Yes, sir. The Court of Claims in 1945 considered three of these cases from Mississippi, and those three cases were consolidated in one opinion and are referred to as the Conn case. He was the first man in the case. The Court of Claims, in that opinion, set out all of the statutes and regulations and held that fire fighters came within the employment regulations and deal with persons who are employed on an irregular basis or those on, say, a piecework basis. They had to have a separate statute.
27 The COURT: The question that disturbed me before and which has come back to my mind now is: Do all fire fighters occupy the same identical status? Aren't there fire fighters and fire fighters or are they all just fire fighters?

Mr. FORT: No, I think, from my recollection of these regulations, there seem to be three different categories of fire fighters. They have what they call the crash crews around an airport who stand by——

The COURT: Is there any difference if a man is in charge of a group of thirty or forty people? He ought to occupy a different status from a man who has just come on the job, if he is fire chief, in other words.

Mr. FORT: At this time I think most of the fire fighters were soldiers, and I think most of these cases deal with a fire chief.

The COURT: Was this Mr. Bruner a soldier?

Mr. FORT: No, sir, he was a chief, a civilian employee. Then they have what they call structural fire fighters who are trained to fight fire, I think, mostly in buildings, and then just the regular fire fighter which Mr. Bruner was. I don't think he had any specialty. I am not at all familiar with the regulations as to how they are paid, but we do contend that the decision of the Court

of Claims in the Conn case would control this point and we
28 have cited one or two or more District Court decisions to the Court where similar claims have been dismissed.

The COURT: Mr. Groover, what do you say your man was? What do you call him?

Mr. GROOVER: Your Honor, if you will look at paragraph 5 in the pleadings, we say: "This action is brought by the petitioner against the United States of America to recover from it moneys owed to the Plaintiff as compensation for services rendered as an employee of the Defendant."

The COURT: What kind of an employee?

Mr. GROOVER: Then if you will refer to our response to his motion for more definite statement—and, if Your Honor will recall, this motion for more definite statement was rather extensively argued before you and considered point by point at Americus, and it was agreed that this met the requirements of the Court at that time—we do not specifically say what his job was. We expect the facts to show that he was a civil service employee, employed in the regular channel by the civil service, placed on duty as chief of the fire department at Camp Wheeler; that his duties there, as specified by the laws governing civil service and the duties as told him by his immediate superiors when he went there, would com-
prise an 8-hour working day; that the length of time for
29 which he was to be paid his salary would be forty hours a week, per annum salary; and that, for such overtime as he might have had to put in, he would be paid overtime, as authorized by applicable statutes and executive order.

We expect the evidence to show that he continued in this status as an employee during the period from March 11, 1941, to September 15, 1944. Of course, the period from March 11, 1941, to March 23, 1942, is barred by the statute, and we are here dealing only with the period from March 23, 1942. We expect the evidence to show further that he continued to work as chief of the fire department and that he was required by his immediate superiors, under orders from the head of the engineers on the post, to be on duty forty-eight hours and off duty subject to call twenty-four hours, rotating all the time. For forty-eight consecutive hours, he was on duty, and then for twenty-four hours he was off duty but was at that time subject to call.

We expect it to show further that during this period of time he was on duty, he was required to be on the post at all times; that he was furnished transportation by the government so that he would be available at all times to all points on the post. Of course, we will not say and the evidence will not show that he
didn't sleep for forty-eight hours. There is a portion of time
30 that he was sleeping, but that during——

The COURT: Hasn't this issue been before the court on

the question of employees engaged by a person furnishing electric service? I know that issue has been up and the employees contended that, by virtue of the fact they were subject to call at any and all hours, they occupied very much the same status apparently that you contend your man Bruner occupied. I know the courts held to the contrary. I don't know where, though.

Mr. GROOVER: There was one Court of Claims case, if I am not mistaken, involving a lighthousekeeper, and they held that all of that time he spent was not working time, but part of it was standby time. However, if Your Honor please, we intend to show here that during the greater portion of that forty-eight hours, this man was actually engaged in physical labor or in the carrying out of the duties prescribed for him by his immediate superiors. The only possible argument that the Government could have that this is not working time during this forty-eight hours is that portion of time during which he was asleep, and then he was required to sleep at the——

The COURT: Wasn't he just simply available? Wasn't he required to be at a place of business and available? He was not actually engaged in doing anything, was he?

31 MR. GROOVER: He was required to be available, Your Honor, the twenty-four hours he was not on duty. For instance, the evidence will show this: the man got up every morning between six and seven o'clock; he immediately went into his duties. He had under his supervision a rotating battalion of negro fire fighters, negro troops, who were assigned to him and his two assistants for the purpose of fire control on Camp Wheeler. He immediately went into his duties of supervision and instruction. He was required to go to all the fire stations about the camp and inspect. During the course of a month, they had to pull in and recharge some 5000 fire extinguishers. Every day at the cessation of the training activities in the so-called woods area, this man, together with his assistant who was then on duty, together with his troops, were required to go into the woods and put out fires that were caused by incendiary bullets and ammunition of various kinds. Usually about ten o'clock at night, he would begin to make up his reports after the inspectors who were made under his supervision had come in, so that the very next day he could begin his tour of inspection to see that those things that were commented on by his inspectors had been dealt with.

I think, Your Honor, we will have no trouble in establishing
32 actual physical movement about the duties of his office during the period of time that he was not asleep. There is some controversy about this sleeping time, as to whether it is merely standby time or not.

THE COURT: Why was he satisfied from March 11th, the date he was employed, until he filed the suit?

MR. GROOVER: The evidence will show, if Your Honor please, that this man on repeated occasions requested and demanded of his immediate superiors that he be placed on a 40-hour week. It will show that a special request was made by then Colonel, subsequently General, Emery to the Mayor of the City of Macon to have this man out there; that in this way he thought he was contributing his portion to the war effort; that even so he was required to work over his protests, which protests were brought to the attention of his immediate superior. The evidence will show that this——

THE COURT: You don't take the position he was making a voluntary contribution to the war effort and was working over his protest at one and the same time?

MR. GROOVER: We do not, if Your Honor please, but we don't think this man was required to quit his job when every day or at least once a week or once every two weeks, intermittently, he was promised by those in charge that this situation was tem-
33 porary and that as soon as it was ironed out, he would be placed on a 40-hour week in accordance with civil service regulations. Certainly the law wouldn't require him to quit the day he was required to work more hours than he thought was necessary, but based on the promises of those in charge, to whom the duty of establishing policy had been delegated, this man stayed there, thinking all the time the matter would be worked out. In fact, early after his departure, the matter was changed. Among the notices to the War Department was a fire inspector's report dated in 1941, which will be in evidence and which——

THE COURT: What did you call it?

MR. GROOVER: The fire inspectors of military posts of the United States made a report dated September 17, 1941, in the remarks of which he said this: "At present the fire chief and two assistant chiefs are each on duty 120 hours every week. If these chiefs continue to work these hours, they will become stale and will not give efficient service. It is recommended that two additional assistant chiefs be allowed this camp, and that present chiefs be permitted more time off duty.

That was brought home in a report specifically made for that purpose. It was brought home to those in charge. I am sure Your Honor had dealings with the military services and found that
34 in some instances officers in charge would give immediate attention to a directive and in other instances, depending on the length of service that they had and the amount of prerogative they thought was theirs, they would insist on taking their own time about it. That is exactly what happened in this case.

THE COURT: Very well. Let's hear your evidence.

MR. FORT: Your Honor, I would like to make one further statement. We want to further assert that the Plaintiff is barred by the doctrine of laches. The first notice of this claim was to the general accounting office in 1946, about three years after it accrued. The doctrine is applied more strictly to public employees who are filing claims than it is generally. A great number of cases hold that any federal employee who has a claim must assert it promptly. Some of them are barred by as little as six months. The courts have barred them, saying that they had slipped on their rights. Then the doctrine is further that an employee who continues to accept the amount of money paid him and works under the conditions waives any right he might have had to claim any additional amount. We say that the Plaintiff is guilty of laches and that his claim is barred by his having accepted the amounts paid through the period involved.

35-317 THE COURT: Very well. Let's see what the evidence is.

PLAINTIFF'S EXHIBIT NO. 1 14

WAR DEPARTMENT

WASHINGTON

May 2[illegible] 1941

To: The Quartermaster General.

By authority of the Secretary of War, the following probationary appointment for the period of six months is hereby confirmed:

Name: Joseph B. Bruner.

Designation: Fire Chief (CAF-9).

Rate of pay: $3200 per annum.

Service: Quartermaster Corps of the Army.

Station: Camp Wheeler, Georgia. QM

Appointment made: March 11, 1941.

This appointment is indefinite (emergency).

John W. Martyn
Administrative Assistant.

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DEFENDANT'S EXHIBIT NO. 4

AG.3-General Inspection.

October 22, 1941.

SUBJECT: Report of Inspection, Camp Wheeler, Fire Department Instructors and Inspectors.

TO: The Quartermaster General, Washington, D. C.

1. This headquarters is in receipt of report of visit September 17, 1941, by Fire Department Instructors and Inspectors at Camp Wheeler, copy of which is attached.

2. Attention is invited to the fact that the supervisory personnel in the Fire Department now on duty at Camp Wheeler exceeds allowance covered in Type Set-up for this size camp.

3. As this report was made by personnel operating directly from the Office of The Quartermaster General, no recommendation for remedial measures have been initiated by this headquarters.

4. It is requested, that this headquarters be advised of action taken by the Office of The Quartermaster General, and if further action is to be taken by this headquarters.

For the Commanding General:

L. B. CLAPHAM
Colonel, A. G. D.
Adjutant General

1 Incl.
Cy of Report.

cc: C-4 OCT 24 1941

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16

PLAINTIFF'S EXHIBIT NO. 3

Washington, D. C.,
June 21st, 1941.

Mr. J. B. Bruner,
Chief Fire Department,
Camp Wheeler, Georgia.

Dear Chief:-

I received your letter dated June 30th. I have been away that is the reason I have not answered you before.

Chief, I don't know just what to tell you about your time off. I know that forty eight hours is too long for a man to be on duty. It will cause him to go stale and he will not give his best service, but there is nothing in regulations stating how many hours you will work, but you can get a ruling on this from the Civil Service of your district. I am sorry that I cannot help you in this matter. Perhaps in a short time you will get some good news about what personnel you will have for your Fire Department.

I hope to pay you a visit in the near future.

Respectfully,

R. E. Lloyd

R. E. LLOYD,
Chief of Fire Instructors
WAR DEPARTMENT.

317c

17

PLAINTIFF'S EXHIBIT NO 2

W.D.,C.P. Div., Form No. 50
(Appd. Apr. 27, 1942)

WAR DEPARTMENT

REPORT OF FIELD PERSONNEL ACTION

HEADQUARTERS CAMP WHEELER, GEORGIA
(Station)

30 June 1943
(Date)

To:

1. Name	Brumer, Joseph B.		9. C. S. C. REPORT SERIES P - 43 - 1422
2. Nature of Action	Administrative Promotion		10. CIVIL SERVICE AUTHORITY
3. Effective Date	1 July 1943		11. Appropriation W.S.A. 1942-43: SOS 4 P 821-01 A 0908-23
	From-	To-	12. Date of Birth 17 July 1904
4. Position	Fire Chief	Fire Chief	13. Subj. to Ret. Act: Yes X / No
5. Grade and/or Salary Allowances	CAF-9, $3200 p/a (no allowances)	CAF-9, $3300 p/a (no allowances)	14. If Seperation, Last Paid Through
6. Bureau and/or Other Unit	4th Serv.Comd. (RU)	4th Serv.Comd. (RU)	15. Bureau Authority for Action or Position: Personnel Allotment Pos. #1005
7. Headquarters and duty Station	Camp Wheeler, Georgia.	Camp Wheeler, Georgia.	
8. Departmental or Field	FIELD	FIELD	

REMARKS: Probational Appointment, 11 March 1941.
Original Position #1005.

Copies To: (Check)

1. [ ] District Manager--Temporary series only.
2. [ ] C. S. C. copy attached--Permanent series only.
3. [XX] Employee. (Original)
4. [ ] Civ. Pers. Field Office--Change in name of Graded employee only.
5. [XX] Payroll Office, Camp Wheeler, Ga. (Other)

For the Commanding Officer:

16. Wm. R. [illegible]
Captain, Infantry,
Chief, Civilian Personnel Branch.
(Title)

317b

ZONE CONSTRUCTING QUARTERMASTER
ZONE IV
494 Spring Street, N. W.
Atlanta, Georgia

FIRE INSPECTION REPORT

STATION: CAMP WHEELER, GEORGIA. DATE SUBMITTED: Sept. 17, 1941.

INSPECTOR: R. E. Lloyd & V. B. Robinson

GENERAL

1. Total ultimate strength of post, including contemplated future increases. 18000
2. Present population of Post, Camp, or Station. 17382
3. Type of construction in per cent:
   Permanent _____ Temporary 100% Tent Camp _____
4. List Fire Department Personnel:

Title	Name	Experience (yrs.)	(mo.)
Post Fire Marshal	Maj. E. L. Littleton		
Chief	Joe M. Bruner	17	
Assistant Chief	W. B. Price (17 yrs) & J. Bruner	20	

5. Give total number of fire fighters assigned to Post Fire Department.
   Enlisted 56 Civilian 0
6. Give total number of non-commissioned officers in fire department on post. (exclusive of above) 6

WATER SYSTEMS & FIRE HYDRANTS

1. Is present water supply adequate for fire protection in all areas, at all times? Yes
   (If not, report exact location of questionable areas.)
2. Are all hydrants located properly with respect to:
   Buildings? Yes Roads? Yes Proper facing? Yes
3. Are hydrants in serviceable condition? Yes
   (Spot check 2½" and 4½" outlets with female coupling.)

FIRE ALARM SYSTEM

1. Is present alarm system adequate? Yes
   (If not, check with Post Signal Officer.)
2. Is system being used for calls other than fire calls? No
3. Is record kept of all alarms? Yes (QM Form 119)
4. How often is fire alarm system tested? Daily

FIRE EXTINGUISHERS

1. Are all extinguishers in serviceable condition? Yes
   (Spot check.)
2. Are extinguishers placed in proper locations? Yes
3. Is number of extinguishers on hand sufficient? No- el If not, has requisition been submitted? No.

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CE - 164

4. Are all Soda & Acid, Foam, and Carbon Tetrachloride type extinguishers tagged with the date of last charging and initialed by charger? Yes
5. Is record kept, in fire station, of fire extinguisher serial number, building location, and date of last charging? Yes

SPRINKLER SYSTEMS

1. Are all post indicator valves in open position? Not completed
2. Are all valves on sprinkler system sealed open? _____
3. Are all sprinkler heads free from obstructions? _____
(Storage material, etc., should not be stacked higher than 18" below the sprinkler line.)

FIRE DEPARTMENT

1. Give location of stations by name or number and truck number of pumper assigned to each.

# 1 Headquarters	80400 & 80689
# 2	80647 & 80687
# 3	80646 & 80680

2. Is Fire Chief complying with A.R. 30-1515? Yes
A.R. 30-1580? Yes
3. Is Fire Chief getting all information pertaining to fire prevention sent from the Office of The Quartermaster General? Yes
4. Is a map of all areas showing location of fire hydrants and alarm boxes posted in fire stations? Yes
5. Are proper records being kept at stations? Yes
6. Do all fire department personnel understand duties? Not all of
7. How many men are on duty at station during meals? 5
8. Is there sufficient fire fighting clothing for personnel? No of
9. Is alarm running schedule satisfactory? Yes
10. Is alarm and telephone watch maintained at headquarters and outlying stations? Yes
11. Are pumpers in good operating condition? Yes
12. Is condition of accessory equipment on pumpers satisfactory? Yes
13. Is condition of 2½" hose satisfactory? Yes Chemical hose? Yes Soft suction hose? No of
14. Has requisition been submitted for replacements or needed equipment? Yes
15. Is 2½" hose changed on apparatus each 30 days? Yes
16. How many pump and hose drills are held weekly? 1
17. Is number of truck drivers and pump operators sufficient? Yes
18. How many firemen are used in daily inspections? 1
19. Who corrects complaints of daily inspectors? Fire Chief
20. Is record being kept of daily inspections? Yes

GENERAL REMARKS & RECOMMENDATIONS

c1 Shortage of 1-Gal. Type C. T. C. in Laundry, Motor Shops and Motor pools. These will be requisitioned.

c2 Due to frequent change in fire department personnel, it is impossible for all men to properly understand duties as fire fighters. However, 3 drills are held each week to familiarize these men with their duties.

c3 Requisition is to be made for additional clothing.

c4 In this camp, as in other camps visited, found 4½" soft suctions pulling loose at connections, and in some instances bursted. Requisition is being made for replacement of bursted suctions.

At present the Fire Chief and 2 Asst. Chiefs are each on duty 120 hours every week. If these chiefs continue to work these hours, they will become stale and will not give efficient service. It is recommended that 2 additional Asst. Chiefs be allowed this camp, and that present chiefs be permitted more time off duty.

This camp is using fire hose for watering grass in almost all sections of the camp. This is in violation of regulations, and should be discontinued at once. It is suggested that smaller or single jacket hose be procured for this purpose.

At Headquarters Fire Station, fire trucks are being used to transport the personnel to and from their meals. This is in violation of regulations and should be discontinued immediately.

A Pressure Gauge, to indicate water pressure in mains should be installed in Headquarters Fire House, from which gauge an hourly check could be made and recorded. This will serve to keep the fire department posted at all times as to water pressure and supply in mains.

Provisions should be made for an office and sleeping quarters for the white Fire Chiefs on duty with the Fire Department. The crowded conditions at the fire stations, wherein the white chiefs are quartered and sleep with from 20 to 25 colored troops, is unsatisfactory. A small building erected in the vicinity of Headquarters Fire Station would remedy this condition. The ideal solution to the above condition, and to give better fire protection to the camp, would be the employment of white civilian personnel for the camp fire department.

Fire Department Instructor, Q.M.C.

21

OZCQM, IV Zone,
413.2-General Inspection.

(Utilities) [illegible]
Of. QM, ZOQM
490 Spring Street
Date October 22, 1941.

USE ONE SIDE ONLY

MEMORANDUM CARRIER SHEET

SUBJECT: Report of Inspection, Camp Wheeler, Fire Department Instructors and Inspectors.

(1) G-4

For concurrence in attached letter, this date, to The Quartermaster General, reference above subject, and calling attention to supervisory personnel at Camp Wheeler exceeding allowance covered in Type Set-up for this size camp.

(2) A.G.

For signature.

RECEIVED
OCT 23 1941
G-4, 4th C.A.

(2) C of S

Concur in attached letter 10/23

(3) AG

Attached letter approved. 10/23

C of S

413.2 - Gen. Insp.

317h

PLAINTIFF'S EXHIBIT NO. 5

22

February 20th 1945.

War Department,
General Claims Division,
General Accounting Office,
Washington, D. C.

Gentlemen:

I have been retained by Mr. Joseph B. Bruner of this City to present a claim before your department for overtime pay due him while he was employed as Fire Chief at Camp Wheeler, Georgia. He contends that he was employed on March 11, 1941 under an agreement that he would work 8 hours a day for 7 days each week. On June 1st he was transferred to U. S. engineers Division from the Quartermaster corps and was placed under Lt. Col. Littleton and performed the same services; that Col. Littleton required him to work 48 hours on duty and 24 hours off duty which made 112 hours each week, with no overtime. This arrangment continued until July 1942 at which time he was given 4 hours overtime each week until January 15th 1943. After January 15th 1943 he was given a percentage raise on his salary to take care of overtime. Under these fact he claims he is entitled to overtime pay from June. 1st 1941 until July 1942 for the difference between 44 hours and 112 hours for each week and from July 1942 until January 15th 1943 for the difference between 60 hours and 112 hours for each week.

My client claims that an inspector, Mr. R. L. Lloyd, Chief of Fire Instructors for the War Department, came to Macon and protested to Col. Littleton about these hours, and this should be shown an inspection sheet at Camp Wheeler; also, that Mr. Robertson, in the 4th Corps Engineers Office, also wrote a protest against these hours.

I am asking that this matter be considered as early as possible and if possible that an investigator be designated to make a [redacted] and investigation of my client's claims at this loc[redacted] that compensation be ordered for the time such invest[redacted] shows my client entitled to.

Very respectfully,

GV/hr.

3171

23

PLAINTIFF'S EXHIBIT NO. 4

Standard Form No. 57
Approved by the Bureau
of the Budget
May 16, 1941

PERSONNEL AFFIDAVIT

WAR DEPARTMENT (Department or agency) Q.M.C. (UTILITIES) (Bureau or division) CAMP WHEELER, GEORGIA (Place of employment)

Name Joseph B. Bruner, Fire Chief, Uncl., $3,200 per annum
(Given name, initial or initials, if any, and last name. Print or type)

Section 9A of Public 252—76th Congress, approved August 2, 1939, otherwise known as the "Hatch Act," provides:

"(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States;

"(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person;"

It is provided in various appropriation acts that no part of the funds so appropriated shall be used to pay the salary or wages of any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence, and that an affidavit shall be considered *prima facie* evidence that the person making the affidavit does not advocate, and is not a member of an organization that advocates, the overthrow of the Government of the United States by force or violence. Such acts provide further that any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence and accepts employment, the salary or wages for which are paid from any such appropriation, shall be guilty of a felony and, upon conviction, shall be fined not more than $1,000 or imprisoned for not more than 1 year, or both, and that the above penalty shall be in addition to, and not in substitution for, any other provisions of existing law.

I, Joseph B. Bruner, do solemnly swear (or affirm) that I have read and understand the foregoing; that I do not advocate the overthrow of the Government of the United States by force or violence; that I am not a member of any political party or organization that advocates the overthrow of the Government of the United States by force or violence; and that during such time as I am an employee of the Federal Government, I will not advocate nor become a member of any political party or organization that advocates the overthrow of the Government of the United States by force or violence.

(Signature of employee)

Subscribed and sworn to before me this ..... day of ..... A. D., 19....,

at ..... (City or place) ..... (State)

[SEAL]

14 1944

U. S. GOVERNMENT PRINTING OFFICE: 1944—O

317j

201— Bruner, Joseph B.

DEFENDANT'S EXHIBIT NO. 5

24

Standard Form No. 61
(Approved by the President, May 22, 1928)

OATH OF OFFICE

Prescribed by Section 1757, Revised Statutes of the United States

WAR DEPARTMENT (Department or Establishment) Quartermaster Corps, Camp Wheeler, Ga. (Bureau or Office)

I, Joseph B. Bruner (Name in full, printed or typed), do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So HELP ME GOD.

Joseph B. Bruner (Signature of Appointee)

Subscribed and sworn to before me this 11th day of March, A.D. 1941

at Camp Wheeler, Macon, (City or place), Georgia (State)

[SEAL]

Margaret B. Jones

Notary Public, Bibb County, Ga.

NOTE.—If the oath is taken before a Notary Public the date of expiration of his commission should be shown.

Commission Expires September 2, 1941.

Position to which appointed Fire Chief

Date of entrance on duty March 11, 1941.

U.S. GOVERNMENT PRINTING OFFICE 16—3000

317k

DEFENDANT'S EXHIBIT NO. 6

29107 am

HEADQUARTERS INFANTRY REPLACEMENT CENTER
Office of the Quartermaster

D #6 5-9-52 RKB

201, Bruner
Joseph B.

Camp Wheeler, Georgia
April 14, 1941

1st Ind

Fifth U. S. Civil Service District
Office of the Manager, Atlanta, Ga.

Selection regular for probational appointment subject to receipt and ... of ... Form 124a and ...

APR 17 ...

Date ... Manager

SUBJECT: Nomination for Probational Appointment.

TO: The Quartermaster, Hq. 4th Corps Area
Old Post Office Building
Atlanta, Georgia

THRU:
The Manager, 5th Civil Service District
New Post Office Building
Atlanta, Georgia.

1. It is recommended that Joseph B. Bruner be probationally appointed to the position of Fire Chief, CAF-9, by selection from Certificate No. 29107, Amended. Mr. Bruner is subject to the retirement act.

2. Job sheet in quadruplicate is attached.

a. New Position:
Date of authority of the Quartermaster General to fill position: Radio P-475 C, OQMG, dated November 17, 1940.
File number: 230.14-Adm., Camp Wheeler.
Salary to be paid: $3,200 per annum.
Appropriation from which paid: P & Q A Project No. 1, QM 2204 P1 0110 A 0535-01.
Whether funds available: Funds are available.

A. T. WRIGHT
Lt. Col., QMC
Quartermaster

FIFTH CIVIL SERVICE DISTRICT
RECEIVED
APR 17 1941

7 Incls.
Incl. 1 - Oath of Office
Incl. 2 - Std. Form 6 (In Dupl.)
Incl. 3 - Form 2413
Incl. 4 - Form 124-B
Incl. 5 - Job Sheet (In Quad.)
Incl. 6 - Cy. letter OCAC dated January 27, 1941 showing authority received from OQMG in Radio P 475 C, dated November 17, 1940 (Dup.)
Incl. 7 - Finger Print Chart.

DEFENDANT'S EXHIBIT NO. 7

W.D., C.P.DIV., Form No. 60 (Appd. Apr. 27, 1942)

WAR DEPARTMENT

REPORT OF FIELD PERSONNEL ACTION
ARMY SERVICE FORCES
HEADQUARTERS CAMP WHEELER, GEORGIA
(Station)

August 24, 1944
(Date)

To: Civil Service Commission, Washington, D. C.

1. Name	Joseph B. Bruner	
2. Nature of Action	Resignation	
3. Effective Date	August 24, 1944 (9 hrs.)	

	From—	To—
4. Position	Fire Chief	
5. Grade &/or Salary Allowances	CAF-9, $3800 p/a (No allowances)	
6. Bureau &/or Other Unit	4th SC, ASF, (Post Engineer, Fire Department)	
7. Headquarters and Duty Station	Camp Wheeler, Georgia	
8. Departmental or Field	FIELD	FIELD

9. C.S.C. REPORT SERIES: P

10. CIVIL SERVICE AUTHORITY:

11. Appropriation: W.P.A., 1942-43 934-1198 P 320-01 809-105 812/30808

12. Date of Birth: 7-17-06

13. Subj. to Retact: Yes / No: X

14. If Separation, Last Paid Through: August 24, 1944 (9 hrs.)

15. Bureau Authority for Action or Position: Pers. 1008

REMARKS: Not indebted on account of unearned leave. Resigned due to the fact he was dissatisfied with working conditions. Leave of absence with City of Macon expired. Last day of active duty: May 27, 1944.

NO VETERAN STATUS

COPIES TO: (Check)

1. ___ District Manager--Temporary series only.
2. ___ C.S.C. copy attached--Permanent series only.
3. X Employee
4. ___ Civ.Pers.Field Office--Change in name of graded employee only.
5. X Payroll Section, Camp Wheeler, Georgia. (Other)

ORIGINAL MAILED Date 8-24-44 mac

For the Commanding Officer:
16. _____ (Signature)
Actg. Chief, Civilian Personnel Branch. (Title)

317m

318 In United States District Court

[Title omitted]

Now comes the United States of America, defendant in the above-stated case, and moves the Court as follows:

MOTION TO DISMISS—Filed May 19, 1948

1

To dismiss the complaint because this Court does not have jurisdiction of the subject matter.

2

To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

JOHN P. COWART,
United States Attorney,
JAMES H. FORT,
Assistant U. S. Attorney,
Attorneys for the Defendant.

319 In United States District Court

[Title omitted]

EXHIBIT TO MOTION TO DISMISS—Filed February 3, 1949

Now comes the United States of America, defendant in the above-stated case, by and through its attorney and with leave of the Court first had, files hereto an affidavit of A. H. Onthank, Director of Civilian Personnel for the Department of the Army, and attachments thereto, as an exhibit to the motion to dismiss filed by the defendant on May 19, 1948.

JOHN P. COWART,
United States Attorney,
JAMES H. FORT,
Assistant United States Attorney,
Attorneys for the Defendant.

ORDER

The foregoing exhibit to motion to dismiss is allowed filed subject to objections by the plaintiff. A copy of the exhibit is to be served on counsel for the plaintiff by mailing same to counsel.

This 2 day of February, 1949.

T. HOYT DAVIS,
United States District Judge.

320 EXHIBIT TO MOTION TO DISMISS

AFFIDAVIT OF A. H. ONTHANK AS DIRECTOR OF CIVILIAN PERSONNEL, DEPARTMENT OF THE ARMY IN THE CASE OF JOSEPH B. BRUNER VS. THE UNITED STATES

STATE OF VIRGINIA,
ARLINGTON COUNTY, ss:

I, A. H. Onthank, being first sworn on oath depose and says:—

That I am Director of Civilian Personnel for the Department of the Army, that I am authorized to represent the Secretary of the Army in matters pertaining to civilian personnel administration, that Camp Wheeler, Georgia, was a field installation of the War Department until its inactivation and that the authority for employment of civilian personnel in the field service of the War Department during the period prior to September 1944 was as outlined below.

1. Article II, section 2, clause 2 of the Constitution provides for appointments to the Federal service as follows:

"He (The President) by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

2. Pursuant to the provisions of the Constitution quoted above, the Congress provided statutory authority for appointments in the act of 26 June 1930 (46 Stat. 817; 5 U.S.C. 43). This act authorizes employment of such number of employees as may be appropriated for by Congress from year to year,

321 with the further provision "That the head of any department or independent establishment may delegate to subordinates, under such regulations as he may prescribe, the power to employ such persons for duty in the field services of his department or establishment."

3. On 23 December 1941, the Secretary of War issued Orders "N" which directed the Chiefs of Bureaus, Arms and Services to delegate appointing authority to their field establishments prior to 1 February 1942. Personnel actions affecting employees whose positions were graded pursuant to the Classification Act of 1923 (Chapter 13; 5 U.S.C.) were subject

to confirmation by the Office of the Secretary of War. Personnel actions affecting the incumbents of ungraded positions could be taken independently by the field establishments. Copy of Orders "N" is attached as inclosure #1 and made a part hereof.

4. On 13 August 1942, the Secretary of War issued Orders "M", to be effective 1 September 1942. This Order rescinded the delegation of authority established by Orders "N" dated 23 December 1941 and delegated authority to the Commanding Generals of the Department's various components to take final action on all personnel transactions in the field services, except on separations with prejudice. Orders "M" is attached as inclosure #2 and made a part hereof.

5. To the best of my knowledge, belief and information the plaintiffs herein were employed either under direct appointment by field offices acting for the Secretary of War (if appointed prior to September 1940), under appointment by the commanding officer of the local military installation which appointment was confirmed by the Secretary of War (if appointed between September 1940 and 1 September 1942) or under direct appointment by the local commanding officer
322 acting for the Secretary of War pursuant to authority delegated to such commanders by the above cited Orders "M". Regardless of such dates or modes of employment, however, on information and belief I certify that they were "officers of the United States" as that term has been applied in *Kennedy v. U. S.*, 148 F. 2d 26 (as to appointments prior to 1 September 1942) and in *Henderson v. U. S.*, 74 F. Supp. 343 (as to appointments subsequent to 1 September 1942).

Further deponent sayeth not.

A. H. SNYTHANK,
Director of Civilian Personnel.

Subscribed and sworn before me this 25th day of January, 1949.

A. F. SPADA,
Notary Public.

My Commission Expires Sept. 14, 1952.

322A

WAR DEPARTMENT,

WASHINGTON, August 13, 1942.

ORDERS:

1. The very rapid increase in the number of civilians required throughout the War Department to prosecute the war effectively demands that personnel be obtained and put to work quickly. This will be facilitated by the establishment of simple procedures for completing personnel actions in the lowest operating echelons practicable, and by the operation of judicious controls to insure the maintenance of uniform standards.

2. The Office of the Secretary of War will take the necessary steps to decentralize to the proper operating units in both the departmental and field services of the War Department the processing of all personnel actions. In order to provide experienced personnel to the departmental and field services so that they can operate satisfactorily under this program, arrangements will be made prior to September 1 to transfer from the Office of the Secretary of War available personnel to the payrolls of the operating units, and the Office of the Secretary of War will upon request assist in training any additional persons required.

3. Authority is hereby delegated to the Commanding Generals, Services of Supply, Army Air Forces, and Army Ground Forces, to take final action on personnel transactions in the field service, cept on separations with prejudice.

4. The Civilian Personnel Division of the Office of the Secretary of War will, through representatives stationed in the operating personnel offices of the departmental service, approved for the War Department the allocation of all classified positions and will review all instruments pertaining to personnel transactions prior to approval by the Secretary of War. In the field service, representatives of the Civilian Personnel Division of the Office of the Secretary of War will assure compliance in action taken under the above delegated authority with Departmental policies, standards, and procedures; Civil Service rules and regulations; Comptroller General's decisions; and established legal requirements; by the appropriate audit and inspection of such actions and will receive all appropriate information to effect the same.

5. These orders will be effective September 1, 1942. Orders N of December 27, 1941, Orders I of July 3, 1942, and any or all portions of any other orders or memoranda conflicting with the provisions of these orders are rescinded as of September 1, 1942.

HENRY L. STIMSON,
Secretary of War.

M.

322B

Corrected Copy.

WAR DEPARTMENT,
WASHINGTON, December 23, 1941.

ORDERS:

SUBJECT: Emergency Procedures re Civilian Personnel.

1. Departmental Service.—As an emergency measure to expedite personnel actions, Chiefs of Bureaus, Arms and Services are authorized to adopt the following procedure for the duration of the emergency. The complete procedure relating to departmental personnel in this Order will be effective upon application and approval, but in no event prior to January 1, 1942.

(*a*) Appointments: Chiefs of Bureaus, Arms and Services are authorized to deal directly with the U. S. Civil Service Commission to effect appointments, including reinstatements and transfers from other Agencies, in the departmental service, subject to confirmation by the Secretary of War. Requests for confirmation (Form CP-55) must be submitted within twenty-four hours following date of employee's entrance on duty.

(*b*) Classification: Control of classification being vested in the Secretary of War, representatives of this Office will be assigned to Bureaus to assist in the preparation of job sheets and to give immediately the required prior approval for the Department.

(*c*) Changes in status:

1. Actions which do not result in changes in salary may be effected by Bureaus with immediate report to and confirmation by the Secretary of War. Actions resulting in change in salary must have prior approval of the Secretary of War.
2. Administrative Within-Grade Promotions: At least two weeks prior to the quarterly automatic promotion date the Secretary of War will send to each Bureau a list of the names of employees eligible for administrative promotion at that time. Unless error is reported by Bureaus within one week thereafter, the Office of the Secretary of War will process the necessary papers to effect such administrative promotions by the pay day following that quarterly automatic promotion date.

(*d*) Transfers: Transfer with change in salary among Bureaus within the War Department will be handled as in *c* above.

322C (*e*) Suspensions: Bureaus have authority to suspend employees from duty subject to confirmation by the Secretary of War. Request for confirmation must be submitted within twenty-four hours.

(*f*) Separations: Such actions, including resignations and furloughs, will continue to be processed by the Office of the Secretary of War, in accordance with present practices. Requests for discharge under Public Law No. 671, 76th Congress, will be handled in accordance with memorandum to Chiefs of Bureaus, Arms and Services, February 15, 1941 (OSW 5/41).

(*g*) Travel: Until presently recommended legislation is approved, requests for permanent change of duty station at Government expense will be submitted in accordance with Civilian Personnel Division Memorandum No. 138, September 22, 1941.

(*h*) Clerical Recruitment: Stenographers, typists and messengers will continue to be recruited by the central clerical recruitment service of the Office of the Secretary of War.

2. Field Service.—

(*a*) Graded Employees: Chiefs of Bureaus, Arms and Services are directed to delegate authority to their field establishments prior to February 1, 1942, to process through the appropriate Field Office of the Office of the Secretary of War all personnel actions for graded employees in positions with salaries up to and including at least $4600 per annum, except discharges with prejudice, and discharges pursuant to Public Law No. 671, 76th Congress. Other actions, including the above exceptions, will be processed through the Office of the Secretary of War, Washington, D. C.

(*b*) Ungraded Employees:

1. Confirmation of appointment, change of Status and separation of ungraded employees will not be made hereafter by Field Offices of the Office of the Secretary of War. However, a copy of all Civil Service Forms 4A will be forwarded promptly by all Bureaus to the Office of the Secretary of War, Washington, D. C.
2. Rates of pay: To promote uniformity of rates of pay by localities among the ungraded employees of the Bureaus of the War Department, the Secretary of War will specify policies and procedures to that end.

322D 3. The statutory responsibility of the Secretary of War for control of civilian personnel in the War Department, for formulating policies and procedures and providing assistance to the Bureaus, Arms and Services in respect thereof, remains unchanged. Accordingly officials in the departmental and the field services are requested to discuss with the Civilian Personnel Division, Office of the Secretary of War and its Field Offices, any pertinent problems. The Office of the Secretary of War must, of course, review programs and actions of Bureaus and their

appointing officers from time to time for consistency with established policies and procedures. Any inconsistencies will be brought to the attention of Bureaus for immediate correction. For the above purpose, representatives of the Office of the Secretary of War are authorized to examine Bureau operations pertinent to civilian personnel and report thereon.

4. All existing civilian personnel policy and procedural directives, not inconsistent with the above, continue in full force and effect.

HENRY L. STIMSON,
Secretary of War.

N

323 In United States District Court

[Title omitted]

PLAINTIFF'S RESPONSE TO MOTION FOR MORE DEFINITE STATEMENT —Filed May 12, 1949.

Comes now the plaintiff and files this his response to plaintiff's motion for more definite statement.

1

In response to paragraph 1 (a) of the said motion, plaintiff says he was employed in the Fire Department at Camp Wheeler, Georgia, for the Quartermaster Corps, Engineer and 4th Service Command, all of which facts are well known to defendant.

2

In response to paragraph 1 (b) of the said motion, plaintiff says he was a fire chief, C A F 9, and his duties were to supervise the fire equipment and fire fighting at Camp Wheeler.

3

In response to paragraph 1 (c) of said motion, the plaintiff says he was employed by Colonel Wright, the then Quartermaster of Camp Wheeler, as to the said officer's authority, that is information peculiarly within the scope of defendant's own knowledge and not within the plaintiff's.

4

In response to paragraph 2 (a) of the said motion, plaintiff says that all of said information is within the scope of defendant's own

knowledge, that it is a matter of evidence and that plaintiff
324 should not be required to furnish the same; and he says the same in response to paragraphs 2 (b), (c) and (d) of the said motion.

5

In response to paragraph 2 (e) of said motion, plaintiff says that those are matters of which defendant is fully cognizant and are laws of the United States and orders of the President of the United States.

6

In response to paragraph 3 (a) of said motion, plaintiff says that is a matter of evidence which will be adduced on the trial of said case.

7

In response to paragraph 4 (a) of said motion, the plaintiff says said protests were made mostly orally but some in writing, and in response to subparagraphs (b) and (c) of the same paragraph, he says the protests were made to one Lt. Col. L. E. Littleton, and to one Capt. Fugate who were the officers in charge of his department and that they were made on numerous occasions, the exact dates of all of which he does not remember and he was ordered to work those hours by the said Lt. Col. Littleton.

THOMAS W. JOHNSON,
HALL & BLACK,
Attorneys for the Plaintiff.

CERTIFICATE OF SERVICE (Omitted in printing)

325-327 In United States District Court

[Title omitted]

PLAINTIFF'S ADDITIONAL RESPONSE—Filed July 1, 1949

Comes now the plaintiff and files this his additional response to defendant's motion for a more definite statement.

1

In additional response to paragraph 2(a) he says he worked, as was required of him, forty-eight hours on and twenty-four hours off. He maintained this work during the entire period of his employment and was required to maintain it by the authorized agents of the defendant, as set out in the original petition and first response.

2

In additional response to paragraph 2(b) he says that the rate of compensation at all times during the period of his employment was $3200.00 until he was raised to $3300.00.

3

In additional response to paragraph 2(c) plaintiff says that he received compensation at his regular rate and only to that extent during his employment. He did not receive any overtime compensation although he worked many overtime hours, as was required of him.

4

Repeated demands have been made on the defendant to make compensation to him for his overtime work, being compensation as required by law, but despite those repeated demands, defendant has refused and still refuses to pay the same.

5

It is for compensation for these overtime hours which he was required to work and for which he received no compensation, that plaintiff files this civil action.

THOMAS W. JOHNSON,
HALL & BLOCH,
Attorneys for Plaintiff.

328-329 Clerk's Certificate to foregoing transcript omitted in printing.

330 In the United States Court of Appeals
for the Fifth Circuit

No. 13,411

JOSEPH B. BRUNER, Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

OPINION OF THE COURT FILED—June 1, 1951

Before HUTCHESON, Chief Judge, and SIBLEY and STRUM, Circuit Judges.

PER CURIAM: Brought under the Tucker Act, 28 U.S.C. Sec. 1346(d)(2), to recover moneys claimed to be due plaintiff for

services rendered under contract with the United States and not paid for, plaintiff's suit was met by a motion to dismiss on the ground that, under the controlling decision in this circuit, *Kennedy* v. *United States*, 146 F (2) 26, plaintiff was an officer of the United States, and the court was without jurisdiction.

331 The district judge, on evidence sufficient to support his conclusion, found: that the plaintiff was appointed by the Secretary of War, pursuant to Art. II, Sec. 2, Clause 2, of the Constitution; that he was an officer of the United States; and that the court was without jurisdiction of his claim. So determining, he dismissed the suit on that ground, and this appeal followed:

We agree that the case is ruled by *Kennedy* v. *United States*, *supra*, and that the judgment should be affirmed.

Affirmed.

332 In United States Court of Appeals

JOSEPH B. BRUNER,

versus

UNITED STATES OF AMERICA.

No. 13,411

JUDGMENT—June 1, 1951.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

333 Clerk's Certificate to foregoing transcript omitted in printing.

334-335 Supreme Court of the United States

No. 87, Misc.—October Term, 1951

[Title omitted]

ORDER ALLOWING CERTIORARI—October 22, 1951.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of cer-

certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 391 and placed on the summary docket.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

336-337 In the Supreme Court of the United States

October Term, 1951

No. 391

STIPULATION AS TO PRINTING OF RECORD—Filed December 4, 1951

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the printed record may consist of the following:

(1) All the pleadings
(2) All proceedings on appeal
(3) Petitioner's exhibits 1, 2, 3, 4 and 5
(4) Respondent's exhibits 4, 5, 6 and 7
(5) Pages 1-12 of the transcript of evidence

It is further stipulated and agreed that the parties hereto may refer to the portions of the certified Transcript of Record not included in the printed record.

CHARLES J. BLOCH,
Counsel for Petitioner.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 3, 1951

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 391

JOSEPH B. BRUNER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF COUNSEL FOR THE PETITIONER

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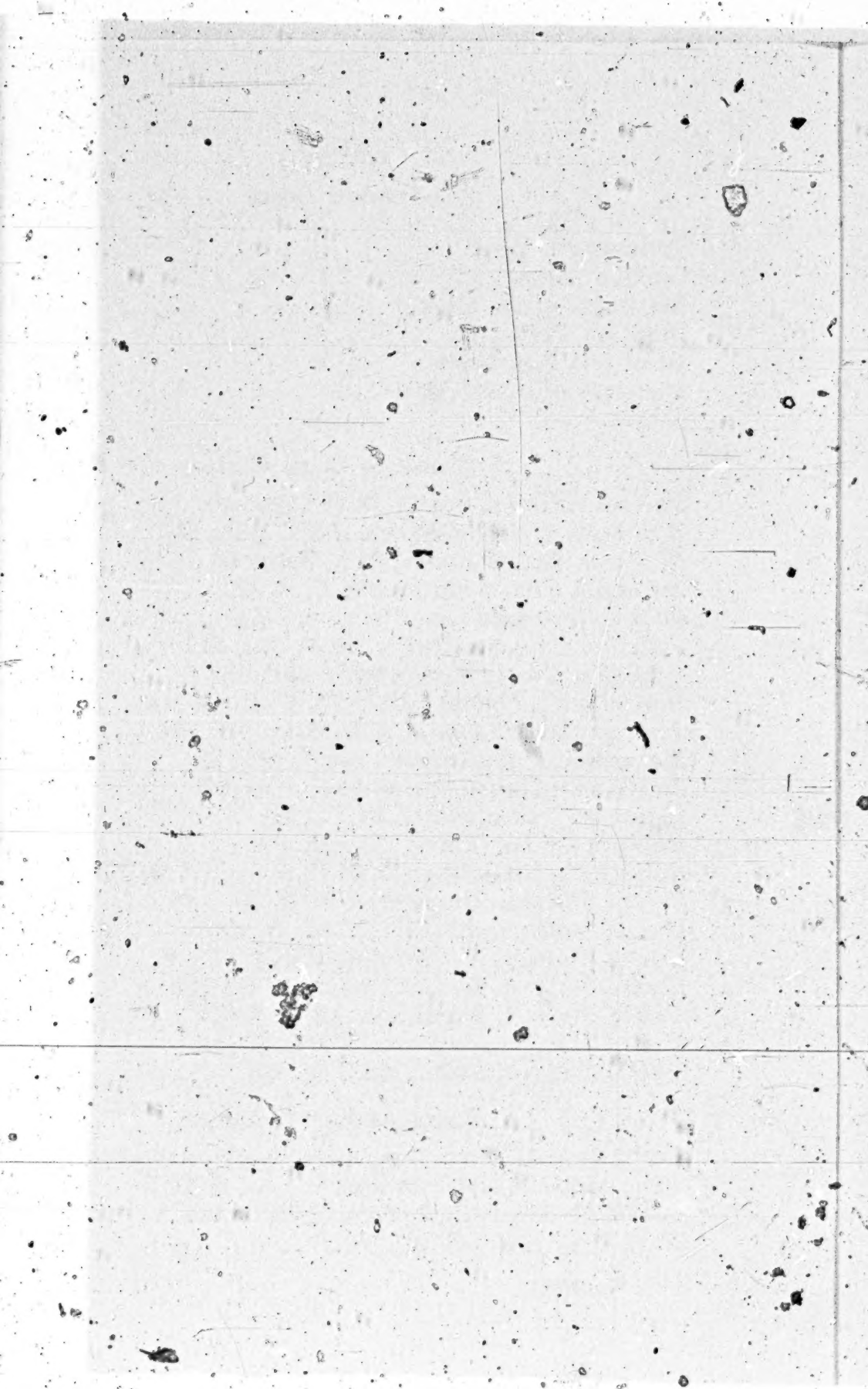

SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF COUNSEL FOR THE PETITIONER

Opinion Below

The District Court for the Middle District of Georgia did not issue any opinion to accompany its orders. The opinion of the Court of Appeals for the Fifth Circuit is reported in 189 Fed. 2d 255. This court granted certiorari on October 22, 1951.

Statement of the Case

On March 23, 1948, Joseph B. Bruner, the petitioner here, filed his complaint in the District Court of the United States

for the Middle District of Georgia seeking to recover compensation for overtime for services rendered the United States as a civil service employee, firefighter, at Camp Wheeler, Georgia, a United States military installation.

The petitioner was employed by someone in the personnel department at the local army installation, went to work and was paid for several months without further confirmation from other authority. He then received a probational appointment dated May 20, 1941 which appointment provided that it was for a period of six months and was signed with the name of an administrative assistant of the Secretary of War, the name of that assistant having apparently been affixed by some other person (plaintiff's exhibit #1). Petitioner was employed in the same manner and in a like procedure as every civilian employee of the War Department. There was no specific act creating petitioner's job. It was and is contended by respondent that the authority for petitioner's employment was based on the blanket authority in the Act of June 26, 1930, 46 Stat. 817, 5 U. S. C. 43, which Act authorizes each individual department to employ such number of "employees" of the various classes therein provided, as may be appropriated for by Congress from year to year. This Act authorized the head of any department to delegate to his subordinates the power, under regulations prescribed by him, to employ.

Upon motion of the respondent, the District Court dismissed petitioner's suit on the ground that he was an "officer of the United States" within the meaning of 28 U. S. C. 1346 (d)(2) and hence was barred from bringing suit in the District Court to recover compensation for overtime pay. The Court of Appeals affirmed this decision (189 F. 2d 255).

Question Presented

The bare question presented in this case to this Court is whether petitioner is an "officer of the United States" within the meaning of 28 U. S. C. 1346 (d)(2) and hence barred from bringing suit in the District Court to recover compensation for overtime. The question necessarily includes the question—"Are all employees of the United States 'officers' of the United States?"

Brief and Argument

The Government contends, and the District and Circuit Courts so held, that this plaintiff is precluded from bringing an action in the District Court to recover overtime pay by the terms of the so-called Tucker Act.

That Act, 28 U. S. C. 1346 (d)(2), provides:

"(d) The District Court shall not have any jurisdiction under this section of: (2) Any civil action to recover fees, salary or compensation for official services of officers of the United States."

Relying on this Section the Government moved to dismiss the plaintiff's complaint. The District Court granted the motion and the Fifth Circuit affirmed the action of the District Court.

So far as we have been able to determine this court has never passed upon this statute as to its application to the various classes employed by the Government. This court has, however, fully considered the meaning of the phrase "officer of the United States" as it is used in other circumstances.

This Court has held that the phrase "officer of the United States" means a person appointed pursuant to the provisions of Article II, Sec. 2, Cl. 2 of the Constitution. *United*

States v. *Germaine*, 99 U. S. 508. The pertinent part of that section is:

"(The President) * * * shall nominate and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court and *all* other *Officers* of the United States, whose Appointments are not *herein* otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think appropriate, in the President alone, in the Courts of Law or in the Heads of Departments." (The words emphasized are those emphasized by the Court in its consideration of the *Germaine* case.)

In *United States* v. *Mourat*, 124 U. S. 303, 307, this Court said:

> "Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the Courts of Justice or Heads of Departments *authorized by law* to make such an appointment, he is not, strictly speaking, an officer of the United States." (Emphasis ours)

Heads of Departments are defined to be what are now called the members of the Cabinet. *U. S.* v. *Germaine, supra; U. S.* v. *Mourat, supra.*

The two last quoted decisions of this court, and the interpretation of the phrase "officer of the United States" there given have been followed and quoted extensively by the lower courts that have been called upon to consider the same phrase in an interpretation of the statute here in question. Thus it has been held that the jurisdictional prohibition of that section is applicable to "constitutional officers" i. e. those officers appointed pursuant to Article II, Sec. 2, Cl. 2 of the Constitution. *United States* v. *McCrory*, 91 Fed.

295 (C. C. A. 5, 1899); *Cain* v. *United States*, 73 F. Supp. 1019 (D. C. Ill. 1947); *Brooks* v. *United States*, 33 F. Supp. 68 (D. C. N. Y. 1940).

We do not believe that petitioner and respondent are at odds on the proposition that the term "officer of the United States" as used in the statute here in question includes only "constitutional officers".

If the petitioner is to be held an "officer", he must have been appointed within the terms of the quoted clause of the Constitution. It is of course obvious that he was not appointed by (1) the President or (2) a Court of Law, so it remains to be determined whether he was appointed by a Head of a Department authorized by law to make such an appointment.

It is the contention of petitioner that to constitute him an "officer" it must be found that (1) he was appointed by the Secretary of War; *and* (2) the Secretary of War was required to make the appointment; *and* (3) the job he held was specifically created by statute? It is our contention that the failure of *any one* of those three prerequisites would preclude a finding that petitioner is an "officer". This was the rationale adopted by the Sixth Circuit in deciding the case of *Beal et al.* v. *United States*, 182 F. (2d) 565, wherein it was decided that persons such as petitioner were not "officers". It is apparently here where lies the distinction between *Kennedy* v. *United States*, 146 F. (2d) 26 on which the Fifth Circuit relied in deciding the case at bar, on which the Government's position rests.

That the rationale of the Sixth Circuit is the correct one becomes clear when the decisions of this court which have considered the phrase are examined.

In *Burnap* v. *United States*, 252 U. S. 512, this court held:

> "Whether (a person) is an *officer* or an *employee* is determined by the manner in which Congress has spe-

cifically provided for the creation of the several positions, their duties, and appointment thereto."

There the Court says: (1) specific creation of the position *and* (2) manner of appointment. It could not then, we submit, be clearer that in the absence of any one of the prerequisites a person is not an officer. In *Beal et al.* v. *United States, supra,* the Sixth Circuit said: "If any one of the three alleged prerequisites that distinguishes officers from mere employees is wanting, the status of persons as officers of the United States is not established."

(1) Was Petitioner Appointed by the Secretary of War?

The record shows that the petitioner was employed first; his "appointment" was over the name of an administrative assistant which was apparently affixed by some third person not identified. We suggest that in this period of multiple employment that the name was probably affixed by persons other than that assistant whose sole duty was to do so. It didn't involve the exercise of any discretion, but was purely a clerical function.

> "The Constitution in the use of the words 'all other officers' indicates clearly that it has provided and defined the only methods by which its officers can be appointed; and *if an appointment is made in any other mode, the appointee is not an officer of the United States within the meaning of that instrument.*" (Emphasis ours.) *Scully* v. *United States,* 193 Fed. 185, (C. C. Nev. 1910).

Here it is beyond question that the most dignity that could be ascribed to the appointive power is that it was delegated downward to an administrative assistant and by him delegated to another. The Constitution said that Congress may "*vest the appointment* * * * in the Heads of Departments." Art. II, Sec. 2, Cl. 2. (Emphasis ours.)

The Constitution didn't authorize the Congress to give the Heads of Departments the power to *delegate* the appointment of "officers". The Constitution gave the Congress power to *vest* appointive power not the power to vest the power to *delegate* appointive power.

That Congress may not, itself, delegate the appointment of an officer of the United States in other than a Cabinet member is shown by *United States* v. *Germaine*, 99 U. S. 508, *supra*. In that case Congress created an office and delegated the power to appoint to one other than a Head of a Department. This court promptly held that he was not an officer. If then Congress could not directly vest such an appointment in a person other than a Cabinet officer, then, *a fortiori* it could not indirectly do so by delegating the power to the Cabinet officer to vest the power in a third person.

It is true that Congress has, as contended by the Government, given the Head of a Department the right to delegate to subordinates "the power to employ such persons for duty in the field services (as might be required)". However, there the Congress used the words "employ" and "employees" as distinguished from "appoint" and "officers".

We respectfully insist that petitioner was not appointed pursuant to the Constitutional provision and his employment pursuant to the provisions of 5 U. S. C. 43 did not constitute him an officer of the United States.

(2) The Secretary Was Not Required to Make the Appointment

We take it the Court will judicially notice the fact that all persons employed by the Government are employed pursuant to some power delegated downward. The Government put up an expert witness in this case who testified:

> "These were the channels: The Secretary of War had the final authority, but he delegated to his Quartermaster General and, in turn to the quartermaster officer at the field station, the authority to appoint" (Pafford tr. 214, R. —).

The Secretary was not required to appoint and indeed had divested himself of the necessity of his action, which under 5 U. S. C. 43 he was authorized to do.

In *U. S.* v. *Mouat, supra,* it was held that a paymaster's clerk appointed by a Navy paymaster with the *approval* of the Secretary of Navy was not an officer of the United States because there was no "act *requiring* his approval of such an appointment." In *U. S.* v. *Smith,* 124 U. S. 525 this court has held that a customs clerk was *not* an officer of the United States, even though his appointment had been *approved* by the Secretary of the Treasury, because the *appointment* was not made by the Secretary, nor was his approval thereof *required.* That the approval of the department head must be *required* before a person is within the phrase is clearly demonstrated further in that opinion. In considering the effect of *United States* v. *Hartwell,* 6 Wall. 385 on its holding the Court said that the fact that in the case of *Hartwell* the appointment could *only* be made with the approbation of the Secretary distinguished it from the *Smith* case where such approbation was *not required.* The Court said, "The *necessity* of the Secretary's approbation to the appointment distinguishes that case essentially from the one at bar." (Emphasis ours.) In the *Hartwell* case the person was held to be an officer because of that necessity of action by the Department head; in the *Smith* case, lacking that requirement, the person was held *not* an officer.

So in the case now before the court under the Statute which the Government contends is the authority for em-

ployment, it is specifically provided that such approbation is not a necessary requisite. Therefore, under the *Smith* and *Mourat* cases this petitioner cannot be an "officer of the United States."

(3) There Is No Statute Specifically Creating the Office of Firefighter

The third prerequisite which we contend must be present to make one an "officer" of the United States is that the position must be specifically created by law. Phrased another way, we contend that there can be no "officer" if there is no "office".

Again we assume that the court will judicially notice that there is some authority for the employment of every person employed by the Government. The various jobs must have been provided for by an appropriation or else no legal payment could be made to the employee. There is, however, a vast difference in making provision for compensation to a general class, including thousands of persons with various duties, and making provision for a specific position with specific duties.

In *United States* v. *Hartwell*, 6 Wall. 385, 393 this court said that the term "office", "embraces the ideas of tenure, duration, emolument, and duties." We take it there is no question that for an "office" to exist it must be created by Congress. See *United States* v. *Schlierholz*, 137 Fed. 616. If we follow the rule in the *Hartwell* case, the *Congress itself* must provide for the "duration, emolument and duties" if it is to have the status of "office". Where in the case at bar has Congress made any such provision? The only provision is a large sum of money appropriated for the payment of salaries to civilian employees generally—no salary for a firefighter, no duties of a firefighter, no tenure or duration. It clearly appears that if that is the

sort of provision meant by the Constitution, then every one of the millions of jobs in the Government is *specifically* created by law. Such a position is, to us at least, absurd. The Constitution, nor Congress, intended such a result.

This proposition is not novel. This court has answered it, and answered it as we contend. The question was before the court in *Burnap* v. *United States, supra.*

There a person had been appointed landscape architect in the office of Public Buildings and Grounds. He had been appointed by the Secretary of War. The court decided he was not an officer but an employee. In so doing Mr. Justice Brandeis speaking for the court said (page 516), "Whether the incumbent is an officer or an employee is determined by the manner in which *Congress* has *specifically* provided for the creation of the several positions, *their duties and* appointment thereto." Again the court said at page 517, as a basis for holding Burnap not to be an officer, "There is *no statute* which *creates* an *office* of landscape architect in the office of Public Buildings and Grounds *nor any which defines the duties* of the position. The only authority for the appointment or employment of a landscape architect in that office is the legislative, executive, and judicial appropriation Act of June 17, 1910." (Emphasis ours.)

In that decision this court has answered the questions here. First, to create an office it must be done *by an act* of Congress and *that act* must provide for the duties. Secondly, a mere appropriation act does not create an office.

In the case before the court the only Congressional authority is the power delegated to Department Heads to employ persons for the field services and a general appropriation act for their compensation. Under the decisions of this court that did not create an office and does not give the petitioner the status of an officer. This is the rule which the Sixth Circuit recognized in the *Beal* case, and we submit correctly so.

Decisions of Other Courts

We have generally limited citations to cases decided by this Court in which it has considered and interpreted the decisive phrase "officer of the United States." We have done so because; first, those decisions and the principles therein laid down fully cover this case and, we believe, demand a finding that the petitioner is not an "officer of the United States;" secondly, the decisions of the lower courts in considering the question are in conflict, if not this case wouldn't be here.

However, for the convenience of the court, we will cite to it such cases, considering this question, as we have at hand in order that this court may have the benefit of whatever aid those decisions might give.

(1) Cases holding *not* an officer.

Beal et al. v. *United States*, 182 F. (2d) 565 (C. C. A. Ky. 1950).

In that case the court held that persons in precisely the same situation as petitioner were not officers of the United States. The court there relied on *Burnap* v. *U. S.*, *supra*, and held that the office must be specifically created and that "appropriation acts do not create offices. There must be a basic authority for the creation of an office."

Cain v. *United States*, 73 F. Supp. 1019.

That case was an action brought by a former secretary to a federal Judge under the Tucker Act and involved the very question here for determination. The court held, even though appointed by a court of justice, he was not an officer because his job was not specifically created by an Act of Congress—holding, relying on the *Burnap* case, that appropriation acts do not create offices.

Brooks v. *United States*, 33 F. Supp. 68.

The plaintiff was a Naval petty officer appointed by his commanding officer under a general delegation—the court held he was not an officer.

Scully v. *United States*, 193 Fed. 185.

In a full and well reasoned opinion, which relied on the decisions of this court heretofore cited, the court held that a deputy surveyor was not an "officer" so as to be precluded from the forum of the district courts in an action for compensation. The court said, even though an act required *approval* of the Secretary of Interior to his appointment, still where the appointment was made by another he was not an officer.

Morrison v. *United States*, 40 F. (2d) 286.

The plaintiff was appointed by his commanding officer under the authority delegated to him by the Secretary of the Navy in accordance with Congressional sanction to distribute the business as the Secretary might think expedient. The court held he was not an officer because (1) the position was not specifically created, *and* (2) this was not an appointment by a department head.

All of those cases base their decision on the reasoning advanced by this court in its decisions. They are, we submit, the correct application of those rules.

(2) Cases holding "Officer".

Kennedy v. *U. S.*, 146 F. (2d) 26.

In that case it was held that a mathematics professor appointed pursuant to an appropriation was an officer. Nowhere in the decision nor in the record before the court was the rule laid down by this court in the *Burnap* case considered or applied. We submit the decision was wrong.

Surowitz v. *U. S.*, 80 Fed. Supp. 716, 719.

In which the court *doubtfully* held a person appointed pursuant to 5 U. S. C. 43 to be an officer. The court there completely overlooked the decisions of this court previously alluded to.

Oswald v. *U. S.*, 96 F. (2d) 10.

A court reporter appointed by (1) a court of justice, (2) pursuant to an act of Congress specifically creating that position, was held to be an "officer". We think correctly so for, as pointed out above, the act specifically created the position and courts of Justice have the constitutional appointive power. The case is not at variance with our position.

Callahan v. *United States*, 122 F. (2d) 216.

A customs service employee appointed by the Secretary of the Treasury was held to be an officer. Again it appears the person was appointed by a department head pursuant to specific authority which "authorized and directed" the appointment. That case is authority for our position.

Foshay v. *United States*, 54 F. (2d) 668.

A postal clerk *appointed by the Postmaster General* (a cabinet officer) was held to be an "officer".

Baskins v. *United States*, 32 F. Supp. 518.

A prison guard *appointed by the Attorney General.* There the plaintiff termed himself an officer.

Henderson v. *U. S.*, 74 F. Supp. 343, and
Jentry v. *U. S.*, 73 F. Supp. 899, 901,

which reached the absurd result sought by the Government that: "This exception (the jurisdictional prohibition) is applied to every grade of employee of the Federal Government."

The Intention of the Law

Much was said by the Government below and will no doubt be said here about the intention of the Statute being to exclude all employees from the District Court Forum.

The physical situation demonstrates that no such intention is present. There are millions of employees of the Government. If this provision excludes them all from litigating in the Federal District Courts it throws the entire burden on the Court of Claims. Certainly such a burden on that Court would be impractical and was not intended by Congress.

As was said in *Scully* v. *United States, supra*, page 186:

"The Government is served by a vast number of persons, and it is possible that any one of these may have a demand which requires adjustment by some tribunal. *The statute does not refer to all cases brought for services rendered to the government by any of its servants, agents, officers, or employees,* but only to those which are brought by officers of the United States for official services." (Emphasis ours.)

The court then goes on there to say: "By the term 'official services', as used in the statute, we are to understand only those services which are peculiar to the office of an officer of the United States; and which such officers are *by law* authorized or required to perform. (Emphasis ours.)

We are ever mindful of the fact that the statute chose the word "officer" instead of some more embracing term. Had the intention of the statute been to exclude all, other more embracing terms would have been used. As was said by this court in *United States* v. *Germaine, supra,*—

"If (the statute) were designed for others than officers as defined by the Constitution, words to that effect would be used, as servant, agent, person in the service or employment of the government; * * *." How simple in the case

before us it would have been for Congress to use some far-reaching term, and let it be remembered that this statute was readopted and the well defined word "officer" retained in 1948 when the judicial code was revised.

The proviso relied on by the government is not to be stretched and strained, as is sought by the government, to resist all claims.

In *United States* v. *McElvain*, 272 U. S. 633, this court held:

"The purpose of the added proviso was to carve out a special class of cases. It is to be construed strictly, and held to apply only to cases shown to be clearly within its purpose."

We think it clear that this statute was meant to apply only to a limited class and not to throw the burden of all claims of employees on one forum—common sense does not admit such an interpretation.

Conclusion

We have sought to demonstrate to the court that under its own decisions there must be three prerequisites found before the status of "officer" is shown to exist. We think further that it is shown that if any *one* is missing the status is not established. Those prerequisites are:

(1.) The appointment must have been made by a cabinet officer, not pursuant to delegated authority from a cabinet officer.

(2.) The appointment must be required to be made by that officer.

(3.) The position must be specifically created by law and is not specifically created by an appropriation act.

it necessary that there be an act of Congress specifically creating the position before the incumbent thereof can be said to be an officer. The overwhelming majority of the cases dealing with the question of whether a person was an officer of the United States turn upon the nature of the appointment rather than upon the nature of, or authority for, the position. In so far as the question of the creation of a position has been concerned, it has been ordinarily regarded that an appropriation act, generally authorizing the employment, is sufficient congressional approval of the position. The few recent cases to the contrary are not persuasive.

ARGUMENT

I

Public Law No. 248 of October 31, 1951, Deprives Federal District Courts of Jurisdiction Over Pending as Well as Prospective Suits by Employees of the United States to Recover Fees, Salary, or Compensation for Their Official Services

The Tucker Act of March 3, 1887, c. 359, 24 Stat. 505, conferred jurisdiction upon the district courts and the circuit courts of the United States, concurrently with the Court of Claims, to entertain suits against the United States, with their jurisdiction limited only as to amounts.[4] As shown in more detail below (*infra*, pp. 22-24), shortly thereafter numerous suits were commenced in the various district courts by Navy Yard mechanics

[4] The jurisdictional limit of the district courts was $1,000 and that of the circuit courts was $10,000.

and letter carriers to recover additional compensation. The volume of these suits and the difficulty of successfully conducting the defense in such suits throughout the United States led to the enactment of the Act of June 27, 1898, 30 Stat. 494, which withdrew from district courts jurisdiction to entertain actions or claims for salaries, fees and compensations for official services of "officers of the United States." This amendment procured the desired result and thereafter the Court of Claims became the recognized and almost exclusive forum for the prosecution of such suits.[5] Within the last few years, however, an increasing tendency on the part of officials and employees of the United States

[5] So far as we have been able to ascertain, between 1898 and 1945 only six District Court cases have entertained compensation suits by persons who might be considered "officers of the United States." In *United States* v. *Swift*, 139 Fed. 225 (C.A. 1, 1905), it was held that a bailiff appointed by a marshal was not an "officer of the United States," but only of the court because, among other reasons, "bailiffs are never sworn in accordance with the statute." In *Scully* v. *United States*, 193 Fed. 185 (C.C. D. Nev., 1910), a demurrer to a suit brought by a deputy surveyor to recover compensation for services rendered pursuant to a contract entered into between him and the United States, acting by the General Surveyor, was overruled on the ground that he was not an officer of the United States, the court stressing the fact that his appointment was not made subject to approval by the head of the Department. In *Morrison* v. *United States*, 40 F. 2d 286 (S.D. N.Y., 1930), the court held that petty officers of the Navy were not officers within the meaning of the statute. While this decision is, in our view, plainly incorrect, Morrison was clearly entitled to recover on the merits, and some $5000 in pay and allowances had been owing to him since 1925; no appeal was taken. In *Brooks* v. *United States*, 33 F. Supp. 68 (E.D. N.Y., 1939), the court, while adopting generally the line of approach of the *Morrison* case on the jurisdictional question, held with the United States on the merits, and so no appeal could be taken. In *Ducey* v. *United States*

to resort to district courts for the recovery of compensation has manifested itself, which tendency was given a strong impetus by the recent decision of the Court of Appeals for the Sixth Circuit in *Beal* v. *United States,* 182 F. 2d 565 (May 29, 1950), which held that the term "officer," as employed in the 1898 Act, referred to constitutional officers in the strictest sense and not to persons who were merely employees of the United States. This Court denied the Government's petition for a writ of certiorari, 340 U.S. 852, apparently unimpressed by the contentions that the question was one of importance and that the decision in the *Beal* case was in conflict with that of the Fifth Circuit in *Kennedy* v. *United States,* 146 F. 2d 26.[6] In the instant case, both the District Court and the Court of Appeals held that

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(D. Minn., 1945, unreported), the court allowed recovery by a physician appointed by the Veterans Administrator, on the ground that he was not an officer of the United States. No appeal was taken because only $60 was involved and the case was unreported. In *Cain* v. *United States,* 73 F. Supp. 1019; 77 F. Supp. 505 (N.D. Ill., 1947, 1948), the suit was by a secretary appointed by a judge, and not by the court or the Director of the Administrative Office of the United States Courts. While the rationale of many of these cases is, in our opinion, incorrect, several are borderline cases, and neither their number nor importance suggested the desirability of procuring amendatory legislation.

[6] The *Beal* case, like the instant case, involved the question of overtime for fire fighters. That same question had been before the Court of Claims in *Conn* v. *United States,* 107 C. Cls. 422, certiorari denied, 332 U.S. 757, rehearing denied, 332 U.S. 819, and the right of such fire fighters to overtime had been denied by the Court of Claims. It is readily understandable why neither Beal nor the petitioner sought to invoke the jurisdiction of the Court of Claims which had already decided the question on the merits against them, but chose instead to try another forum.

petitioner had no standing to maintain his suit, relying upon the *Kennedy* action. This Court granted certiorari on October 22, 1951, apparently because of the direct conflict between the instant case and the decision of the Sixth Circuit in the *Beal* case.

It is in this setting that Public Law No. 248, of October 31, 1951, must be considered.[7] Section 50 (b) of that statute amended 28 U.S.C. 1346(d)(2) to read as follows:

> (d) The district courts shall not have jurisdiction under this section of:
>
> (1) Any civil action or claim for a pension;
>
> (2) Any civil action or claim to recover fees, salary, or compensation for official services of officers or employees of the United States.

As its legislative history indicates, (*infra*, pp. 25-26), Congress was undertaking to eliminate the divergence of views which had commenced to manifest itself in lower federal courts by making "it more clearly appear" that those courts lacked jurisdiction to entertain suits for salary or compensation brought either by officers (in the strict sense) or employees. If the amendment be regarded as merely restating what the law has always been, then there never was any jurisdiction

---

[7] The bill passed both houses of Congress on October 20, 1951, and was submitted to the President on October 22, 1951 (97 Cong. Rec., daily ed. 13946, A7140). It was approved by the President on October 31, 1951, and became law on that date. This Court granted certiorari in this case on October 22, 1951.

in district courts to entertain suits of this nature; if it effected a change in the law, then it automatically deprives the district court of any jurisdiction longer to entertain a suit for salary or compensation by an employee of the United States. Whether the amendment be regarded as a legislative interpretation of the 1898 Act or whether it be regarded as constituting new legislation, the end result is the same: United States District Courts have no present jurisdiction of suits by officers or employees for fees, salary, or compensation.

Petitioner asserts that he is an employee and not an "officer" within the meaning of Section 1346 (d)(2), as it formerly stood. But that section now clearly deprives the district courts of jurisdiction over salary suits by Government employees, as well as Government "officers", and petitioner's suit must therefore be dismissed. It is settled that —in the absence of a statutory savings provision or comparable special rule of law—no judgment can be rendered in a suit after the repeal of the Act under which it was brought and prosecuted and "if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, * * * the court must decide according to existing laws". *United States* v. *The Schooner Peggy,* 1 Cranch 103, 110; *Norris* v. *Crocker,* 13 How. 429, 439; *Insurance Company* v. *Ritchie,* 5 Wall. 541, 544; *Ex Parte McCardle,* 7 Wall. 506, 512-514; *Dinsmore* v. *Southern Express Co.,* 183 U.S. 115, 120;

Crozier v. *Krupp*, 224 U.S. 290, 302; *Gulf, C. & S. F. Ry.* v. *Dennis*, 224 U.S. 503, 506; *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U.S. 9, 21; *Carpenter* v. *Wabash Ry. Co.*, 309 U.S. 23, 27; *Standard Oil Co. of Kansas* v. *Angle*, 128 F. 2d 728, 730 (C.A. 5); *Seese* v. *Bethlehem Steel Co.*, 168 F. 2d 58, 62 (C.A. 4).

The rule is peculiarly applicable where it is the jurisdiction of the court that is withdrawn during the course of litigation. Thus, in *Ex Parte McCardle, supra*, Congress, after the case had been argued on the merits and while it was under advisement by this Court, withdrew the jurisdiction of this Court to review judgments of the circuit courts in cases involving petitions for writs of habeas corpus. In holding that the withdrawal of jurisdiction rendered unnecessary a discussion of any other question, Chief Justice Chase, speaking for the Court, stated (7. Wall, at 512, 514):

> The first question necessarily is that of jurisdiction; for, if the act of March, 1868, takes away the jurisdiction defined by the Act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.
>
> * * * * * * *
>
> * * * the general rule, supported by the best elementary writers [Dwarris, Stat. 538], is that "*when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed.*" And the effect of repealing acts upon suits under acts repealed, has been determined

> by the adjudications of this court. The subject was fully considered in *Norris* v. *Crocker* [13 How. 429], and more recently in *Insurance Company* v. *Ritchie* [5 Wall. 541.] In both of these cases it was held that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted." [Emphasis added.]

See also, to the same effect, *De Groot* v. *United States*, 5 Wall. 419, 432; *Insurance Co.* v. *Ritchie*, 5 Wall. 541, 544; *Gordon* v. *United States*, 7 Wall. 188, 195; *Ex Parte Yerger*, 8 Wall. 85, 104; *The Assessor* v. *Osbornes*, 9 Wall. 567, 575; *United States* v. *Tynen*, 11 Wall. 88, 95; *Railroad Co.* v. *Grant*, 98 U.S. 398, 401; *In re Hall*, 167 U.S. 38, 42; *Gwin* v. *United States*, 184 U.S. 669, 675; *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 234; *Smallwood* v. *Gallardo*, 275 U.S. 56, 61-2; *United States* v. *Wheelock Bros., Inc.*, 341 U.S. 319.

The identical problem here presented arose when Congress first passed the 1898 Act amending Section 2 of the Tucker Act (now 28 U.S.C. 1346(d)(2)). In *United States* v. *Kelly*, 97 Fed. 460 (C.A. 9) and in *United States* v. *McCrory*, 91 Fed. 295 (C.A. 5), suits had been brought for a recovery of salaries by postal carriers while such suits were permitted. After the judgments of the district court in favor of the employees, and while the cases were before the appellate courts on writs of error, Congress enacted the amendment depriving the district courts of jurisdiction of suits for

compensation by officers of the United States. Both courts held that the 1898 amendment effectively deprived the district courts of jurisdiction and abated the writs of error.[8] Following these and similar holdings, which left many claimants precluded by limitations from suing in the Court of Claims (Cf. H. Rept. No. 72, 56th Cong., 1st Sess.), Congress, by the Act of February 26, 1900 (31 Stat. 33), provided that no action, pending on June 27, 1898, should abate or be affected by the passage of that Act, and that all suits dismissed by reason of "said Act" should be restored to their places in such courts and proceeded with as if the same had not been enacted.

The fact that Congress passed the 1951 amendment to Section 1346 (d)(2) without a saving

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[8] In the *Kelly* case, the Court of Appeals for the Ninth Circuit stated (pp. 460-461):

> The question arises whether the act deprives the courts of the United States of jurisdiction of causes which were pending at the time of its enactment. * * * In the circuit court of appeals for the Fifth circuit, in U. S. v. McCrory, 33 C.C.A. 515, 91 Fed. 295, it was held that the effect of the statute was to deprive the courts of the United States of jurisdiction to entertain pending cases. * * * The supreme court in a series of decisions has recognized the doctrine that, when jurisdiction of a cause depends upon a statute, the repeal of the statute without a reservation as to pending cases deprives the court of all the jurisdiction which the act conferred. * * *

In *Smallwood* v. *Gallardo*, 275 U.S. 56, 62, this Court expressly held that a statute withdrawing jurisdiction from the trial court effectively ends the case even though it had already been appealed to a higher court. "When the root is cut the branches fall."

clause [9] is critical, for only by virtue of a saving clause, similar to that embodied in the Act of February 26, 1900, can the repealing statute be precluded from abating pending cases as well as those commenced subsequent to the act. *Insurance Co.* v. *Ritchie,* 5 Wall. 541, 544; *Ex parte McCardle,* 7 Wall. 506, 514; *The Assessor* v. *Osbornes,* 9 Wall. 567, 575; *United States* v. *Tynen,* 11 Wall. 88, 95; *Railroad Co.* v. *Grant,* 98 U.S. 398, 401.; *In re Hall,* 167 U.S. 38, 42; *Gwin* v. *United States,* 184 U.S. 669, 675; *Kline* v. *Burke Construction Co.,* 260 U.S. 226, 234. Thus, in *Railroad Co.* v. *Grant,* 98 U.S. 398, 401, this Court stated, "It is equally well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law." Likewise, in *Gwin* v. *United States,* 184 U.S. 669, 675, this Court declared: "* * * a repealing statute which contains no saving clause operates as well upon pending cases as those thereafter commenced." [10]

It is plain that there is no specific saving clause applicable to this case. Nor is petitioner's suit

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[9] P. L. No. 248 did not contain a saving clause for "rights or liabilities" existing under certain other statutes which were repealed, in whole or in part, by that Act. See Section 56 (l), 65 Stat. 720.

[10] Unless the 1951 amendment somehow preserves the future jurisdiction of the District Court to hear and decide petitioner's case, it is impossible for him to recover. Unlike the *Kelly* and *McCrory* cases (*supra*, pp. 14-15), the District Court had held *against* petitioner before the 1951 amendment, and it cannot now enter a judgment in his favor unless it continues to have jurisdiction. Cf. *United States* v. *Wheelock Bros., Inc.,* 341 U.S. 319.

saved by the general saving clause (1 U.S.C., Supp. IV, 109). Even on the doubtful assumption that that statute applies to "liabilities" of the United States, it can only be read as preserving "liabilities" incurred under the statute which is repealed. Here, the Government's liability, if any, was not incurred under, or created by, Section 1346(d)(2), which is no more than a consent to suit. The liability continues and may be vindicated, if it exists, in the Court of Claims. The general saving clause was not intended to affect mere withdrawals of consent to sue the United States. Cf., *Lynch* v. *United States*, 292 U.S. 571, 581-2.

The instant case is clearly governed by the above rules. The existing law is that district courts do not have jurisdiction over actions such as that filed by petitioner. And in the absence of a savings clause that law must be applied here. It follows that in all pending cases, involving suits for salary, fees or compensation by officers or employees of the United States, the district courts no longer have jurisdiction, if they ever had, and petitioner can no longer maintain his suit.

Thus far in this Point, we have assumed that the 1951 amendment did not purport retroactively to limit the jurisdiction of the District Courts in these salary claims cases. But it may very well be that Congress did more than simply withdraw jurisdiction for the present and future. The amend-

ment's legislative history (*infra*, pp. 25-26) shows that Congress was clarifying and making explicit what it deemed to have been the law since 1898. In these circumstances, the 1951 statute can be viewed as a retroactive construction and amendment of the prior statute—a retroactive provision which furnishes the rule to govern the courts in transactions which are past. *Stockdale* v. *The Insurance Companies*, 20 Wall. 323, 331-332.

There is nothing unconstitutional in such retroactive legislation. Litigants are not being deprived of a claim or of the right to maintain an action. Congress has merely indicated the forum in which they are to proceed. This Court stated in *Ex parte Collett*, 337 U.S. 55, 71: "'No one has a vested right in any given mode of procedure * * *' *Crane* v. *Hahlo*, 258 U.S. 142, 147 (1922)." See also *Hallowell* v. *Commons*, 239 U.S. 506, 508. In particular, withdrawal of consent to suit invades no constitutional rights. See *Lynch* v. *United States*, 292 U.S. 571, 581-2.[11]

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[11] In *Kline* v. *Burke Construction Co.*, 260 U.S. 226, this Court, in rejecting the contention that the retroactive application of a repealing statute upon pending cases violated a constitutional right by depriving a litigant of a judgment of a lower court in his favor, stated at page 234:

> * * * Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. * * * The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it re-

II

The Courts Below Correctly Held That Petitioner Is an "Officer of the United States" Within the Meaning of 28 U.S.C. 1346(d) (2), Prior to Its Amendment on October 31, 1951

For the reasons stated above (pp. 8-18), we submit that the amendment of October 31, 1951, is dispositive of the instant controversy and that it is unnecessary for the Court further to inquire into the correctness of the decision below. However, we also submit that the decision below is correct on the basis of the law as it stood at the time of the lower courts' decisions.

The question which the courts below were called upon to determine was whether the word "officer" as used in 28 U.S.C. 1346(d)(2), prior to the amendment of October 31, 1951, was intended to be limited to the classification of constitutional "officers" of the United States, as that term is employed in Article II, Section 2, of the Constitution, or whether it was intended to include all regular government employees. A subsidiary question is whether, assuming that the term was restricted to those persons whose appointment is

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quires an act of Congress to confer it. *The Mayor* v. *Cooper*, 6 Wall. 247, 252. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall. *The Assessors* v. *Osbornes*, 9 Wall. 567, 575. A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, cannot well be described as a constitutional right.

provided for in Article II, Section 2, the petitioner falls fairly within that class. We submit that the decision below is sustainable upon either or both of these grounds.

A. *Under 28 U.S.C. 1346(d)(2), the District Court lacked jurisdiction of a suit for salary or compensation by any regular employee of the Government.*

The jurisdictional statute, as it read prior to the 1951 amendment, withheld jurisdiction from the district courts of suits by "officers" of the United States for compensation for official services. Petitioner urges that the word "officers" must be interpreted in the sense in which it was used in Art. II, Sec. 2, of the Constitution and that it did not comprehend employees of the United States who did not come within that classification. But numerous decisions of this Court warn that most "words have different shades of meaning and consequently may be variously construed * * *, * * * the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which these purposes are expressed, and of the circumstances under which the language was employed." *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433. An expression in a statute may have a different meaning from precisely the same expression in constitutional provisions. *Towne* v. *Eisner*, 245 U.S. 418, 425; *Gully* v. *First National Bank*, 299 U.S. 109, 117-118. Thus,

this Court has held that a Navy paymaster's clerk is not an "officer" within the meaning of that word as used in one statute (*United States v. Mouat*, 124 U.S. 303), but, in a decision handed down the same day, equally held that such a clerk was an "officer" for the different purposes of a different statute (*United States* v. *Hendee*, 124 U.S. 309).[12] And in *Steele* v. *United States No. 2*, 267 U.S. 505, 507-508, the Court expressly rejected the contention that the expression "civil officer of the United States duly authorized to enforce, or assist in enforcing, any law thereof", as used in the Espionage Act of 1917, was limited to constitutional officers. On the contrary, it construed the expression to have been intended by Congress to comprehend all those persons who are most widely employed to enforce or assist in enforcing laws, irrespective of whether they are constitutional officers.

Where a word such as "officer" may have varying meanings in different contexts, we submit that, in order to ascertain its meaning in a particular statute, resort should be had to the intent of Congress and the end which the statute was fashioned to achieve, and that that intent should be controll-

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[12] In the *Hendee* case, the Court stated (p. 313):

> We have just decided, in the case of *United States* v. *Mouat*, *ante*, 303, that a paymaster's clerk is not, *in the constitutional sense of the word*, an officer of the United States; but we added also that *Congress may have used the word "officer" in a less strict sense in some other connections*, and in the passage of certain statutes might have intended a more popular signification to be given to that term. [Emphasis added.]

ing. Cf. *Mitchell* v. *Cohen*, 333 U.S. 411, 417-420. Here, the legislative history of the 1898 amendment, which withheld jurisdiction of salary claims by "officers of the United States" (*supra*, p. 9), plainly discloses a definite congressional intent to withdraw jurisdiction of all federal salary claims from the district court and to require all ordinary employees of the United States to resort to the Court of Claims if they sought to vindicate their right to compensation by suit against the United States.

Following the enactment of the Tucker Act and prior to the Act of June 27, 1898, suits by government workers for compensation could be freely maintained in the district courts. *United States* v. *McCrory*, 91 Fed. 295 (C.A. 5). The volume of overtime pay suits, filed by letter carriers and navy yard mechanics as a result of the Acts of May 24, 1888, c. 308, 25 Stat. 157, and of August 1, 1892, c. 352, 27 Stat. 340, providing for an eight-hour day, soon became a problem.[13] Repeated recom-

[13] The Annual Report of the Attorney General in 1894 discloses that the fiscal year 1894 saw 37 district court letter carriers' overtime cases disposed of, but 1,025 individual judgments had to be entered in the 37 cases. In fiscal 1895, of the total of 48 new suits filed in the district courts under the Tucker Act, 15 were suits for mechanics' overtime, the number of individuals suing not being specified. In fiscal 1897, of 47 new suits, 19 were for letter carriers' overtime, the number of individuals suing again left unspecified. As a result of congressional enactment of the recommended legislation in 1898, however, it was reported in 1900 that the total of all new Tucker Act suits outside the Court of Claims had been reduced to 18, the reduction being attributed to the exclusion of suits for compensation by government employees (*ibid.*, 1900, p. 54).

mendations were made for the restriction of such litigation to the Court of Claims (*e.g.*, Annual Report of the Attorney General, 1894, p. 10, 1897, p. 7). Thus, in 1895, the Attorney General reported: "I recommend that claims of United States officers or employees for compensation, expenses, or fees be excluded from the jurisdiction of the circuit and district courts" (*ibid.*, 1895, p. 15).

Congress responded to these recommendations by amending the Tucker Act so as to withdraw from the district courts jurisdiction to entertain "cases brought to recover fees, salary, or compensation for official services of officers of the United States." Act of June 27, 1898, 30 Stat. 494, 495. The reason for the amendment and its purpose were stated in H. Rept. No. 325, 55th Congress, 2d Session, February 1, 1898,[14] to be as follows:

> First. That the circuit and district courts are widely separated geographically, and often while one of them may be deciding a question in one way another may be deciding it another way; and there is now a large number of conflicting judgments on the same questions.
>
> Second. Cases are brought against the United States at places remote from the capital, of which the proper Department is not advised, and proper defenses are impracticable and are often not made. For example—
>
> The act of July 31, 1894, provides that no person holding an office worth $2,500 per annum shall hold another compensated office.

[14] There is no other pertinent material either by way of a Senate report or in the debates. Cf. 31 Cong. Rec. 1731.

> A held the office of clerk of the circuit court of appeals, of which the compensation exceeded $2,500. He also held the office of clerk of circuit court of the United States, with large compensation. The Treasury refused to pay him for the second office. He thereupon brought suits quarterly in the district court of the United States for less than $1,000, and for a while recovered.
>
> Many other abuses might be cited of a similar general character.

The report thus evidences a congressional intent that suits for salary, overtime, fees, and every other type of official compensation were thereafter to be limited to the Court of Claims—a court located at the seat of the Government where departmental records are readily available and where the defense of the suits could be conducted by attorneys specializing in, and conversant with, the laws and regulations involved. Were the statute given the restrictive interpretation for which petitioner contends, the results which the statute was intended to achieve would be largely frustrated.[15]

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[15] In *Surowitz* v. *United States*, 80 F. Supp. 716, 718 (S.D. N.Y.), Judge Rifkind, in commenting on this issue, observed:

> Superficially, it might be argued that Congress intended to allow run-of-the-mill employees to have convenient access to the federal courts of the districts of their residence but to require the more important officials of the government to assert their claims in the Court of Claims in Washington. This argument will not stand inspection. The judicial history of the term "officers" makes abundantly clear that neither the importance of the task nor the size of the compensation has any bearing upon the classification.

That the term "officer", as employed in the 1898 Act, was understood to include all regular civil-service employees is underscored by the avowed reasons which led Congress to adopt the 1951 amendment (discussed below). As now provided, the district courts have no jurisdiction of salary claims by officers *or employees* of the United States. The legislative purpose in amending the section to include the term "employees" is set forth by both the House and Senate Reports on the proposed amendment, which state (H. Rept. 462, 82nd Cong., 1st Sess., p. 14; S. Rept. 1020, 82nd Cong., 1st Sess., p. 16):

> Subsection (b) amends section 1346(d)(2) of title 28, United States Code, *to make it more clearly appear* that the jurisdiction of the district courts does not include actions or claims for fees, salary, or compensation of federal officers or employees. [Emphasis added.]

The implication is plain that ever since the inclusion of this jurisdictional provision in the Tucker Act in 1898 Congress had meant "officers" to include all regular government employees, and that the purpose of the 1951 amendment is only "more clearly" to carry out that intention.[16] This construction is further supported by the legislative debate on the bill to amend certain titles of the United

[16] It should be noted that it was only in very recent years that the bringing of salary suits in the district courts had again become a problem. See *supra*, pp. 8-10.

States Code (which became P. L. No. 248) which reveals that Congress did not consider this amendment to be a change in substantive law but merely to be expository of existing law. During the consideration of the bill by the House of Representatives, the following discussion ensued (97 Cong. Rec. (daily ed.) 13845-6):

> Mr. REED of Illinois. Mr. Speaker, reserving the right to object, am I correct in understanding that this bill is merely clarifying and corrective as to certain titles of the code, and that in only one instance is there any substantive law involved, and that is, as I recall, where an appeal is permitted from the District Court of Guam to the Ninth Circuit? * * *
>
> Mr. BRYSON: [Floor leader of the bill] That is true.
>
> Mr. REED of Illinois: Mr. Speaker, I withdraw my reservation of objection.

The congressional understanding that the construction expressly set out in the amended statute should have been applied from the inception of the exception to jurisdiction is clear. This legislative construction, even though it may not be binding on the judiciary [10a] "May be considered to assist in the interpretation of prior legislation upon the same subject" (*Tiger* v. *Western Investment Co.*, 221 U.S. 286, 309) and "would go far to remove doubt as to its meaning if any existed" (*First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640,

[10a] For the rule as to a retroactive amendment, as distinguished from a legislative construction, see *supra*, pp. 17-18.

658). See also *Cope* v. *Cope*, 137 U.S. 682, 688; *N.Y., Phila. & Norfolk Rd. Co.* v. *Peninsula Produce Exchange*, 240 U.S. 34, 39-40; *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 277; *White* v. *Winchester Country Club*, 315 U.S. 32, 39.

Any construction of the section in question holding that the term "officers," prior to the 1951 amendment, was limited to a few "high-level" officers and excluded the large majority of government workers would be in conflict with the intention of both the Congress which passed the 1898 Act and that which enacted the 1951 clarifying amendment. Nor is there undue hardship for petitioner or any litigant to sue in the Court of Claims, since the Court of Claims follows the practice upon request of the plaintiff of holding hearings for the taking of evidence at his place of residence or at locations serving his convenience and that of his witnesses.

B. *Every civil service employee appointed by authority of the head of his department and executing the required oath of office is an inferior constitutional officer of the United States within the meaning of "officer" in Section 1346(d)(2).*

We have undertaken above (pp. 20-27) to demonstrate that petitioner, even if only an "employee" of the United States, came within the prohibition of Section 1346(d)(2). However, we also submit that the decision below is equally sustainable on

the ground that petitioner is also an inferior officer within the intendment of Article II, Section 2 of the Constitution (Appendix, *infra*, p. 35).

In *United States* v. *Mouat*, 124 U.S. at 307, this Court set out the rule as to what constitutes a constitutional officer of the United States:

> What is necessary to constitute a person an officer of the United States, in any of the various branches of its service, has been very fully considered by this court in *United States* v. *Germaine*, 99 U.S. 508. In that case, it was distinctly pointed out that, under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a Department; and the heads of the Departments were defined in that opinion to be what are now called members of the Cabinet. Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or by one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.[17]

The evidence presented to the District Court discloses that, in substance, petitioner meets the requirements of a constitutional officer of the United States as thus formulated.

In order to show the method of petitioner's

[17] See also *Burnap* v. *United States*, 252 U.S. 512, 516.

appointment, the Government submitted an affidavit of A. H. Onthank, the Director of Civilian Personnel of the Department of the Army (R. 28-29) as an exhibit to its motion to dismiss. This document disclosed that petitioner Bruner, after passing the required civil-service examination (R. 4), was appointed by the commanding officer of the local military installation on March 11, 1941, and the appointment was confirmed by the Secretary of War on May 20, 1941 (R. 28-29, 14). See *supra*, pp. 2-5.[18] Petitioner then executed the required oath of office (R. 24).[19] On the basis of these undisputed facts, the trial court concluded as a matter of law that (R. 5):

> This court does not have jurisdiction of this case as the plaintiff was an officer of the United States within the meaning of the Tucker Act (28 U.S.C., Sec. 1346(d)(2)). Plaintiff was appointed pursuant to the statutes and regulations as set out in the affidavit of A. H. Onthank, Director of Civilian Personnel, Department of the Army, said affidavit being a part of the record in this case as an exhibit to defendant's motion to dismiss.

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[18] Petitioner's Exhibit No. 1 (R. 14) and Government's Exhibit No. 6 (R. 25) show the recommendatory nature of petitioner's original designation and the confirmatory action by authority of the Secretary of War. Furthermore, paragraph 2 of the Onthank affidavit (R. 28) recited the statutory authority for appointment, via delegation under the Act of June 26, 1930, 46 Stat. 817; 5 U.S.C. 43, *infra*, p. 35, and the payment from annual appropriation acts of petitioner's salary.

[19] These ordinarily are indicia of an appointment to "office." *Collins* v. *Mayor*, 3 Hun. (N.Y.) 680, 681.

This holding of the District Court, affirmed by the court below, accords with the overwhelming weight of authority. The first reported case under the 1898 amendment was *United States* v. *McCrory*, 91 Fed. 295, 296. There, the Court of Appeals for the Fifth Circuit, in holding that a letter carrier was an officer within the meaning of the amendment, stated:

> It is argued that letter carriers are not officers of the United States, within the meaning of the statute in question, but are mere employes, not intended to be included in the statute. Letter carriers are appointed by the postmaster general under authority of the acts of congress, practically during good behavior. They are sworn and give bond for the faithful performance of their duties. They are paid from moneys appropriated for the purpose by congress, and their salaries are fixed by law. They have regularly prescribed services to perform, and their duties are continuing and permanent, not occasional or temporary. In U.S. v. Hartwell, 6 Wall. 385, 393, the supreme court declared that "an 'office' is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties." In U.S. v. Germaine, 99 U.S. 508; Hall v. Wisconsin, 103 U.S. 5, 8; U.S. v. Perkins, 116 U.S. 483, 6 Sup. Ct. 449; U.S. v. Mouat, 124 U.S. 303, 8 Sup. Ct. 505; U.S. v. Smith, 124 U.S. 525, 8 Sup. Ct. 595; and in Auffmordt v. Hedden, 137 U.S. 310, 11 Sup. Ct. 103,—U.S. v. Hartwell, supra, is cited with

approval. An examination of these cases, all bearing on the question in hand, will show that, in the opinion of the supreme court, where a person is appointed under authority of law by the head of a department, and his duties are continuing and permanent, and his emolument fixed, such person is an officer of the United States; and that, within the constitutional meaning of the term. Letter carriers, therefore, are officers, within the meaning of the above-quoted statute, restricting the jurisdiction of the circuit and district courts in regard to suits brought against the United States under the act of 1887.

Subordinate officials or employees similarly appointed, and with comparable status, have consistently been held to be "officers" of the United States in the constitutional sense. *Oswold* v. *United States,* 96 F. 2d 10 (C.A. 9) (court reporter); *Callahan* v. *United States,* 122 F. 2d 216, 218 (C.A. D.C.) (customs employees); *Borak* v. *Biddle,* 141 F. 2d 278, 281 (C.A. D.C.) (attorney); *Kennedy* v. *United States,* 146 F. 2d 26 (C.A. 5) (mathematics instructor, Air Corps); *Thomason* v. *United States,* 184 F. 2d 105 (C.A. 9) (Army Transport seaman). See also *Surowitz* v. *United States,* 80 F. Supp. 716 (S.D. N.Y.) (War Department attorney); *Henderson* v. *United States,* 74 F. Supp. 343 (S.D. N.Y.) (Army Transport seaman); *Jentry* v. *United States,* 73 F. Supp. 899 (S.D. Cal.) (Army Transport seaman); *Foshay* v. *United States,* 54 F. 2d 668 (S.D. N.Y.) (clerk).

Petitioner contends that those persons only are officers who have been appointed by a department head personally and not by the head's delegatee. But both the *Oswold* and the *Kennedy* cases, *supra*, held that approval by the department head was sufficient,[20] and it has generally been held that whether the department head has acted by approval or by delegation, as authorized by 5 U.S.C. 43 (*infra*, Appendix, p. 35), the appointee is an officer. *United States* v. *Hartwell*, 6 Wall. 385, 393; *McGrath* v. *United States*, 275 Fed. 294, 301 (C.A. 2); *Surowitz* v. *United States*, *supra*, 80 F. Supp. at 719; *Henderson* v. *United States*, 74 F. Supp. 343, 344 (S.D. N.Y.). Indeed, it may be doubted if many of the "inferior officers" whose appointment is vested by Congress in the department heads and whose suits for official compensation have been litigated were appointed by the department head acting in his proper person. See also *United States* v. *Marcus*, 166 F. 2d 497, 503 (C.A. 3), to the effect that statutory authority in the department head to appoint will be taken to mean that there was appointment or at least approval by him.

Petitioner also urges that to be an "officer of the United States"—even an inferior officer, as described in Article II, Section 2 of the Constitution—the party involved must be the incumbent of a position expressly created by statute. This is not

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[20] See Orders M and N of the Secretary of War delegating the appointive powers of the Secretary to his subordinates (R. 30-33) (*infra*, Appendix, p. 36). Petitioner's appointment was confirmed by the Secretary (R. 14, 29).

an element set forth in the classic definition of the *Mouat* case, *supra*, p. 28. Cf. *United States* v. *Germaine*, 99 U.S. 508; *United States* v. *Hartwell*, *supra*. Moreover, this argument, aside from its unrealistic approach to present day conditions, is one with which the courts, with the exception of the recent *Beal* case, have not concerned themselves (see cases cited, *supra*, pp. 30-31); they have been content to rely upon the fact that an appropriation act has authorized, at least inferentially, the creation of the position.

It is true that *Beal* v. *United States*, 182 F. 2d 565 (C.A. 6), certiorari denied, 340 U.S. 852, held that because the position of firefighter was not specifically authorized by statute the plaintiffs were not officers of the United States, and posited its holding upon some language of this Court in *Burnap* v. *United States*, 252 U.S. 512. We respectfully submit that the court in the *Beal* case misconstrued the *Burnap* decision. While there are certain words in the *Burnap* case which might seem to lend some support to the proposition for which it is cited in *Beal*, the major issue in the *Burnap* case was whether Congress had vested appointive power in the Secretary of War, as head of the department, to hire landscape architects. In holding that the Secretary of War lacked such power, this Court did not base its decision on the lack of a specific statute authorizing such appointment, but on the fact that a specific statute authorizing the Chief of Engineers to employ the landscape archi-

tect overrode the general provision conferring the power of appointment upon the head of a department.

Petitioner's appointment was conferred by and made under the authority of the head of his department and he took his oath of office for an indefinite period, at a predetermined salary, to perform supervisory functions in a well defined field of activity (fire fighting), the duties of which were set forth in an official manual issued by the War Department (Tr. 155, 161-163). Petitioner is thus squarely within the rule that "where a person is appointed under authority of law by the head of a department, and his duties are continuing and permanent, and his emolument fixed, such person is an officer of the United States; and that, within the constitutional meaning of the term." *United States* v. *McCrory*, 91 Fed. 295, 296 (C.A. 5).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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JANUARY, 1952.

APPENDIX

1. Article II, Section 2, of the Constitution reads in pertinent part as follows:

> [The President] * * * by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

2. The statutory provision authorizing employment of petitioner is the Act of June 26, 1930, 46 Stat. 817, 5 U.S.C. 43, which provides (as it appears in the United States Code):

> There is authorized to be employed in each executive department, independent establishment, and the municipal government of the District of Columbia, for services in the District of Columbia or elsewhere, such number of employees of the various classes recognized by sections 661-663, 664-669, 670-672, 673, and 674 of this title, as may be appropriated for by Congress from year to year: *Provided*, That the head of any department or independent establishment may delegate to subordinates, under such regulations as he may prescribe, the power to employ such persons for duty in the field services of his department or establishment.

3. Orders N of the Secretary of War, December 23, 1941, read in part as follows (see R. 31-33 for full text):

> Appointments: Chief of Bureaus, Arms and Services are authorized to deal directly with the U.S. Civil Service Commission to effect appointments, including reinstatements and transfers from other Agencies, in the departmental service, subject to confirmation by the Secretary of War.

4. Orders M of the Secretary of War, August 13, 1942, read in part as follows (see R. 30 for full text):

> Authority is hereby delegated to the Commanding Generals, Services of Supply, Army Air Forces, and Army Ground Forces, to take final action on personnel transactions in the field service, except on separations with prejudice.

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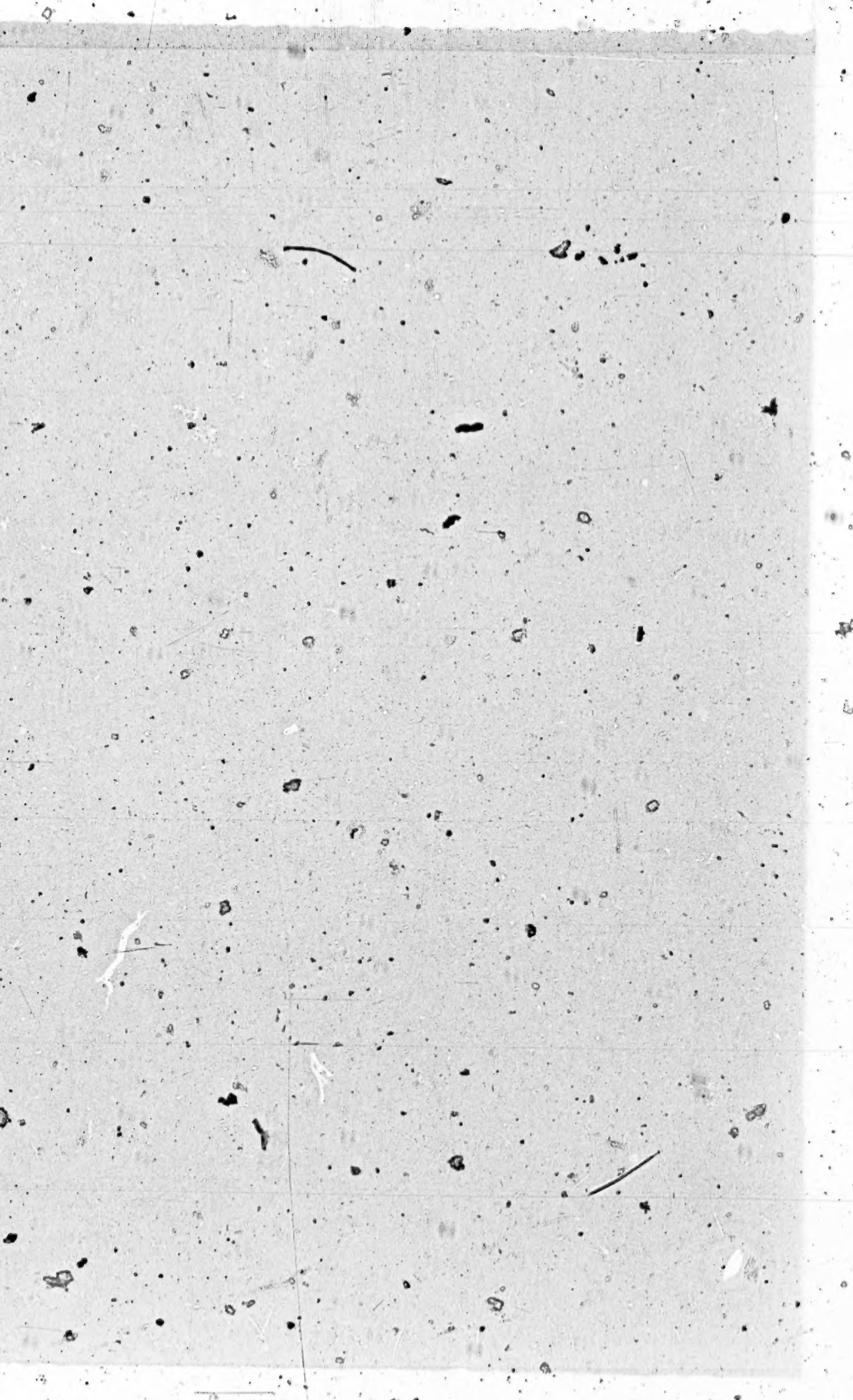

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 391.

JOSEPH B. BRUNER, *Petitioner*,

v.

UNITED STATES OF AMERICA.

BRIEF FOR WILLIAM A. BEAL, ET AL., AMICI CURIAE.

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This case is here on certiorari to review the decision of the Court of Appeals for the Fifth Circuit reported at 189 F. 2d 255. Certiorari was acquiesced in by the United States because of conflict with the decision of the Court of Appeals for the Sixth Circuit in *Beal* v. *United States*, 182 F. 2d 565, in the construction of 28 U. S. C. 1346(d)(2). Certiorari was granted on October 22, 1951, and both parties consented to the filing of this brief in view of the interest of the amici, as parties to the *Beal* case, in the issues there raised.[1]

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[1] On October 30, 1951, after certiorari was granted, Sec. 1346(d)(2) was amended so as to bar hereafter salary claims in the District Courts by either "officers" or "employees" of the United States. Sec. 50, Pub. Law 248, 82nd Cong., 65 Stat. 710, 727). This amendment, of course, deprives the case of its "practical significance for the more than 800,000 classified civil service employees" urged by the Solicitor General in his acquiescence to the writ. However, the present case was not rendered moot since the amendment did not affect pending actions. See Point IV of brief, *infra*, at page 30, *et seq.*

OPINIONS BELOW.

The per curiam opinion of the Court of Appeals below is reported at 189 F. 2d 255. The conflicting opinion of the Court of Appeals for the Sixth Circuit is reported at 182 F. 2d 565.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 29, 1950. Jurisdiction of this court was invoked, and acquiesced in, under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether the claim of petitioner, a civilian fire fighter, appointed by a commanding officer in the field to a position not specifically created by statute, was within the scope of 28 U. S. C. 1346(d)(2) depriving the District Courts of jurisdiction of salary claims by any "officer of the United States".

2. Whether Pub. Law 248 (65 Stat. 727) of October 31, 1951, precluding "employees" as well as "officers" from suing in the District Courts, applies to pending cases, particularly where, as here, the Statute of Limitations has now barred a new action in the Court of Claims, leaving the petitioner with no forum for the enforcement of rights otherwise within the protection of the Fifth Amendment.[2]

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[2] Amici, after the decision in *Beal* v. *United States*, supra remanding the case for trial, obtained a judgment in the District Court for the Eastern District of Kentucky, on March 16, 1951. Hence they would in no event presumably be affected by Pub. Law 248, since no further action will be required on their claims by the District Court, unless error in the proceedings is found by the Court of Appeals on the government's appeal. Cf. *Kans. Pac. Ry. Co.* v. *Twombly*, 100 U. S. 78; approved in *Huron Holding Corp.* v. *Lincoln Mine Operating Co.*, 312 U. S. 183, 189.

CONSTITUTION AND STATUTES INVOLVED.

Sec. 2 of the Act of June 27, 1898 (30 Stat. 494) amended Sec. 2 of the Tucker Act (24 Stat. 505) by adding the following:

> The jurisdiction hereby conferred upon the * * * district courts shall not extend to cases brought to recover fees, salary or compensation for official services of officers of the United States * * *.

The provision was carried over as Section 24(20) of the Judicial Code of 1911 (36 Stat. 649; 28 U. S. C. 41(20)) so as to read:

> Nothing in this paragraph [dealing with suits against the United States] shall be construed as giving * * * to the district courts jurisdiction of cases brought to recover fees, salary or compensation for official services of officers of the United States * * *.

and was rephrased in the 1948 Revision of the Judicial Code, 28 U. S. C. 1346(d)(2) as follows:

> The district courts shall not have jurisdiction of: * * * (2) Any civil action to recover fees, salary or compensation for official services of officers of the United States.

On October 31, 1951, by Pub. Law 248, 82nd Cong., 1st Sess., Sec. 50 (65 Stat. 710, 727) the subsection was amended by inserting after "officers", the words "or employees".

Article II, Section 2, Clause 2 of the Constitution provides in part:

> * * * The Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

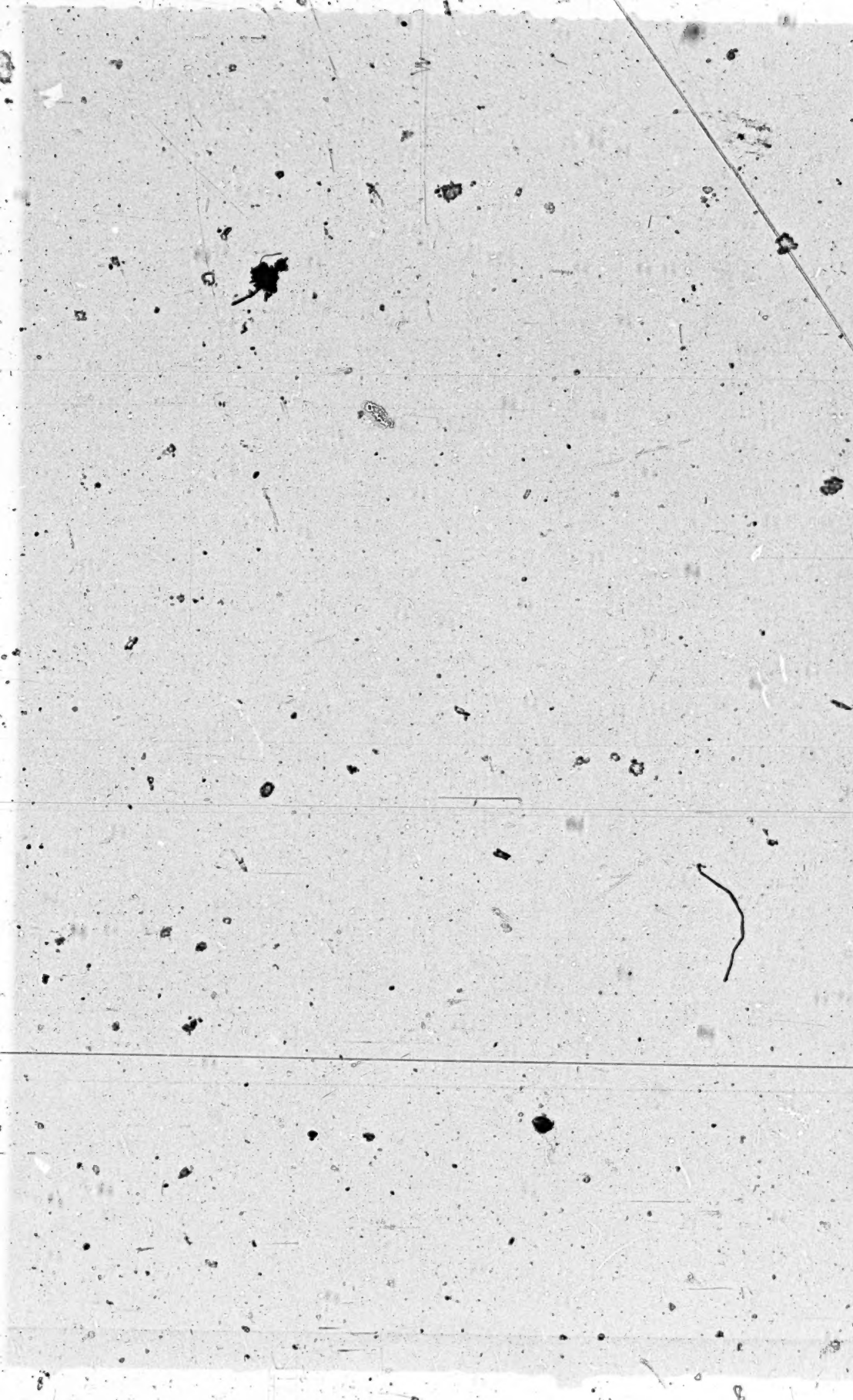
The Act of June 26, 1930 (46 Stat. 817, 5 U. S. C. 43) reads as follows:

There is authorized to be employed in each executive department, independent establishment, and the municipal government of the District of Columbia, for services in the District of Columbia or elsewhere, such number of employees of the various classes recognized by [the Classification Act of 1923, as amended (5 U. S. C., ch. 13)] as may be appropriated for by Congress from year to year: *Provided*, That the head of any department or independent establishment may delegate to subordinates, under such regulations as he may prescribe, the power to employ such persons for duty in the field services of his department or establishment.

STATEMENT.

On March 23, 1948, petitioner brought suit against the United States in the District Court for the Middle District of Georgia to recover overtime compensation. Petitioner was employed as a civilian fire fighter in the "field service" of the War Department. There was no statute creating the position in which he was employed, his employment being under the omnibus authorization of the Act of June 26, 1930 (46 Stat. 817, 5 U. S. C. 43) authorizing the employment of "such number of employees of the various classes recognized by [the Classification Act of 1923] as may be appropriated for by Congress from year to year." His appointment was not made, nor was it required to be made, by the "head of the department" in which he was employed, but by the commanding officer of Camp Wheeler, Georgia, pursuant to the proviso in 5 U. S. C. 43, *supra*, permitting delegation to "subordinates" of power to employ persons for duty in the "field services" of any department or establishment.

Both the District Court and the Court of Appeals, on appeal, held that petitioner was an "officer of the United States" so as to be precluded from suing in the District Court by 28 U. S. C. 1346(d)(2). Certriorari was sought because of conflict with *Beal* v. *United States*, *supra*, decided by the Court of Appeals for the Sixth Circuit.



SUMMARY OF ARGUMENT.

I. The term, "officer of the United States", as used in the Act of June 27, 1898 (30 Stat. 494) and as codified successively in Sec. 24(20) of the 1911 Judicial Code and Sec. 1346(d)(2) of the 1948 Judicial Code, does not include all government civil servants but only those who are "officers" in the constitutional sense.

(a) 28 U. S. C. 1346(d)(2), a subsection of the Judicial Code of 1948, was derived from Sec. 24(20) of the Judicial Code of 1911, which in turn was derived from Sec. 2 of the Act of June 27, 1898, which amended the Tucker Act by excluding from the district courts suits for salary claims brought by "officers of the United States". When the 1898 amendment was enacted, this Court had already construed statutory references to "officers of the United States" as meaning only those persons whose appointments were authorized by Congress in accordance with Art. II, Sec. 2, Clause 2 of the Constitution. *United States* v. *Germaine*, 99 U. S. 508 (1879); *United States* v. *Mouat*, 124 U. S. 303 (1888); and *United States* v. *Smith*, 124 U. S. 525 (1888). Only where the court found an unmistakable intention to cover other employees, did it construe the term more broadly. Cf. *United States* v. *Hendee*, 124 U. S. 309.

(b) Inasmuch as the phrase "officer of the United States" had a well-established meaning at the time of the enactment of the Act of June 27, 1898, that meaning should be accorded to it in construing the statute unless Congress has clearly manifested a contrary intention. *Case* v. *Los Angeles Lumber Products Company*, 308 U. S. 106, 115.

Nothing in the legislative history of the 1898 amendment indicates any intention on the part of Congress to use the words "officers of the United States" in that statute in a sense different than had previously been accorded them by the Courts. To the contrary, the debates on the bill (Cong. Rec. 55th Cong., 2d Sess., pp. 1731, 1732) and the report

of the House Judiciary Committe (H. R. Rep. No. 325, 55th Cong., 2d Sess.) indicate that the principal purpose of the act was to remove from the jurisdiction of the District Courts not suits for salary claims brought by *all* federal employees but only those brought by those who had a salary of $2,500 per annum or more. In those days of low salaries, only those members of the federal service who held positions of great dignity and were clearly "officers of the United States" in the constitutional sense commanded salaries in so high a bracket. Act of July 31, 1894 (28 Stat. 162).

(c) Beginning with *United States* v. *McCrory*, 91 Fed. 295 (CCA 5, 1899), virtually *every* court considering the 1898 amendment has construed the words "officers of the United States" in accordance with the decisions of this Court cited above in (a). Even the Court of Appeals for the Fifth Circuit has conceded that the test of whether the statute applied was whether the employee was an officer in the constitutional sense (*Kennedy* v. *United States*, 146 F. 2d 26 (1944)), the only issue between that court and the Court of Appeals for the Sixth Circuit being in the application of that test.

(d) In view of this consistent judicial interpretation of the June 27, 1898, amendment as applying only to officers in the constitutional sense, Congress must be presumed to have adopted that meaning in both the 1911 and 1948 Codifications of the Judicial Code, both of which retained the identical phrase "officers of the United States". *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 115; *Keck* v. *United States*, 172 U. S. 434, 457. Such presumption is especially compelling as to the 1948 Codification since in contemporaneous revisions of sections of the criminal code, the phrase "officers of the United States" was changed to read "officers *or employees of the United States*", so as to "clarify" or "broaden the scope" of those sections. Cf. 18 U. S. C. 201, 203, 214, 215, 216, 654.

II. *The accepted tests of whether a particular civil servant is an officer in the constitutional sense are* (a) *whether Congress provided that he be appointed by the President, a head of a Department; or a Court of Law, and* (b) *whether the position to which he is appointed was specifically created by statute. Under either of these tests, petitioner was not an officer in the constitutional sense.*

In determining who is an officer in the constitutional sense in construing 28 U. S. C. 1346(d)(2) and other statutes, the courts have not attempted to draw the line on the basis of the importance of the duties to be performed or the qualifications of the employee. Instead, they have accepted either (a) the decision of Congress to vest appointments in subordinate officials (*United States* v. *Germaine*, supra; *United States* v. *Smith*, supra); or (b) the failure of Congress to specifically create the position to which the person is appointed (*Burnap* v. *United States*, 252 U. S. 512; *Martin* v. *United States*, 168 Fed. 198 (CCA 8, 1909); *Cain* v. *United States*, 73 F. Supp. 1019 (D. C. Ill. 1947); *Beal* v. *United States*, 182 F. 2d 565 (CCA 6, 1950)) as a conclusive legislative determination that the appointee was not an officer in the constitutional sense. By either of these tests, petitioner was clearly not an officer within the meaning of the statute.

III. *Even aside from these traditional tests and considering the nature of his position and duties and the scope of his authority, petitioner was clearly not an "officer of the United States" either within Art. II, Sec. 2, Cl. 2 of the Constitution or in the commonly accepted meaning of the term.*

This Court has never had occasion to look behind the decision of Congress authorizing appointments by subordinate officials so as to determine where the line should be drawn between those civil servants who, because they are "inferior officers", may only be appointed in the manner

prescribed by Art. II, Sec. 2, Clause 2 of the Constitution, and those who may be appointed by subordinates. In two early opinions, the Attorney General stated that, because Inspectors of Customs and Assistant Assessors were federal "officers" in the constitutional sense, statutes which purported to vest in subordinate officials the power to appoint to such positions were unconstitutional. 4 Op. Atty. Gen. 162 (1843); 11 Op. Atty. Gen. 209 (1865). On the other hand it seems clear that "window cleaners, scrub women, elevator boys, door keepers" need not be appointed by department heads. Cf. *Krichman* v. *United States*, 256 U. S. 363. Regardless of where the line may be drawn, petitioner was certainly not performing such duties or vested with such authority as to require this Court to find that he was an officer in either the constitutional or the commonly accepted sense. *Martin* v. *United States*, *supra*; *Cain* v. *United States*, *supra*. Hence, even disregarding the traditional tests, petitioner was not so clearly an officer of the United States as to preclude him from suing in the District Courts.

IV. *Sec. 50 of Public Law 248 is not applicable to this or other pending cases.*

To apply Sec. 50(b) to pending cases will compel some litigants to start afresh in the Court of Claims and leave others, as to whom the Statute of Limitations has run, *with no forum at all* in which to enforce rights otherwise within the scope of the Fifth Amendment. Cf. *Lynch* v. *United States*, 292 U. S. 571. Such intention is not to be imputed to Congress, unless no other interpretation is possible. *Sorrells* v. *United States*, 287 U. S. 435, 448. Cf. *Duke Power Company* v. *South Carolina Tax Commission*, 81 F. 2d 513, 517 (CCA 4).

(a) In situations comparable to this, this Court has held that even a procedural statute will not be construed as affecting pending cases unless the nature of the statute, its legislative history, or the language used *unequivocally* re-

quire such construction. *Twenty Per Cent Cases*, 87 U. S. (20 Wall.) 179; *United States* v. *St. Louis, San Francisco and Texas Ry. Co.*, 270 U. S. 1.

(b) Normally, the absence of a saving clause raises an inference that a statute is affirmatively intended to withdraw jurisdiction as to pending as well as future cases. Here, the legislative history of Sec. 50(b) rebuts any such inference. The section was considered as merely "clarifying and corrective". Accordingly there was no occasion for including, or considering the inclusion of, a saving clause and hence no inference can be drawn from its absence that Congress must affirmatively have intended to affect pending litigation.

(c) The language of Sec. 50(b) of Public Law 248 does not unequivocally refer to pending actions. A Congressional intent to apply this statute to pending cases need not be implied by reading the words "any actions" as necessarily encompassing pending as well as future actions. *United States* v. *St. Louis, San Francisco and Texas Ry. Co., supra;* and see *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 287.

(d) Prior decisions of the Court applying other procedural statutes to pending as well as future cases are distinguishable from the case at bar as either containing explicit retroactive language or involving policy objectives from which such retroactive application could be fairly implied. *Carpenter* v. *Wabash Ry. Co.*, 309 U. S. 23; *United States* v. *Schooner Peggy*, 5 U. S. (1 Cranch) 103; cf. *Smallwood* v. *Gallardo*, 275 U. S. 56. No such policy considerations are apparent in the case at bar. Decisions such as *United States* v. *McCrory*, 91 Fed. 295, are questionable, and demonstrate the wisdom of the rule of *United States* v. *St. Louis, San Francisco and Texas Ry. Co., supra.*

ARGUMENT.

I.

THE TERM "OFFICER OF THE UNITED STATES", AS USED IN THE ACT OF JUNE 27, 1898 (30 STAT. 494) AND AS CODIFIED SUCCESSIVELY IN SEC. 24(20) OF THE 1911 JUDICIAL CODE AND SEC. 1346(d)(2) OF THE 1948 JUDICIAL CODE, DOES NOT INCLUDE ALL GOVERNMENT CIVIL SERVANTS BUT ONLY THOSE WHO ARE "OFFICERS" IN THE CONSTITUTIONAL SENSE.

28 U. S. C. 1346(d)(2), a subsection of the Judicial Code of 1948, was derived from Sec. 24(20) of the Judicial Code of 1911, which in turn was derived from Sec. 2 of the Act of June 27, 1898, which amended the Tucker Act by excluding from the district courts suits for salary claims brought by "officers of the United States".

That these successive statutes each used the term "officers of the United States" in a limited sense is clear from the following discussion.

(a) *By June 27, 1898, when the Tucker Act was amended, the term "officer of the United States" had acquired a special and well-accepted meaning.*

It is a "familiar rule that where words are employed in an act which had at the time a well known meaning in the law, they were used in that sense *unless the context requires* the contrary".* *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 115; *United States* v. *Stewart*, 311 U. S. 60, 63. That the term "officer of the United States" did have such well known meaning when the Tucker Act was amended by the Act of June 27, 1898, is clear from a series of Supreme Court decisions which preceded the enactment of the amendment.

In *United States* v. *Germaine*, 99 U. S. 508, Germaine, a

* Emphasis supplied. All emphasis herein supplied unless otherwise indicated.

surgeon working for the Commissioner of Pensions, was indicted under § 12 of the Act of 1825 (4 Stat. 118) imposing penalties upon "every officer of the United States" who was guilty of extortion. The Commissioner of Pensions was then "in the Department of Interior" (R. S. 1873, § 470), charged with performing his duties "under the direction of the Secretary of the Interior". (R. S. 1873, § 471). Germaine was appointed under an act providing "that the Commissioner of Pensions * * * is * * * authorized to appoint * * * civil surgeons".

The Supreme Court held the indictment demurrable on the grounds that (1) from the nature of Germaine's employment, and (2) *from the fact that his appointment had been authorized by Congress to be made by the Commissioner of Pensions*, he was not an "officer". With respect to this second ground of decision, the Court said:

> "The Constitution, for purposes of appointment, very clearly divides all its offices into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But, foreseeing that when offices become numerous and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of the departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt. * * * It is, therefore, not to be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish anyone not appointed in one of these modes. *If the punishment were designed for others than officers as defined by the Constitution, words to that effect would be used, as servant, agent, person in the service or employment of the Government; and this has been done where it was so intended,* as in the 16th section

> of the Act of 1846,[3] concerning embezzlement, by which any officer or agent of the United States, and all persons participating in the act are made liable. 9 Stat. at L. 59." (99 U. S. 508 at pp. 509, 510.)

The same view was taken in *United States* v. *Mouat*, 124 U. S. 303. Mouat was a paymaster's clerk appointed by a Navy paymaster *by delegation of authority from the Secretary of the Navy.* He sued for a mileage allowance under the Act of June 30, 1876, allowing such mileage to "officers of the Navy". The court again held that, in the absence of evidence of a different legislative intent, the quoted words would be limited to officers as defined by the Constitution, and since Mouat had not been appointed by the Secretary of the Navy he was not an "officer" within the meaning of the statute. The Court, citing *United States* v. *Germaine, supra,* said:

> "Unless a person in the service of the Government * * * holds his place by virtue of an appointment by the President, or by one of the courts of justice or heads of department authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States." (124 U. S. 303 at p. 307.)

Again, in *United States* v. *Smith*, 124 U. S. 525, a clerk in the office of a collector of customs was appointed pursuant to Sec. 2634 of the Revised Statutes of 1873 providing that "the Secretary of the Treasury may, from time to time * * * limit and fix the number and compensation of the clerks to be employed by any collector * * *". He was indicted for violating Sec. 3639 of the Revised Statutes requiring the safe keeping of funds by certain enumerated officials "and all public officers of whatsoever character". The Court held that the indictment should be dismissed on

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[3] See, also, act of August 5, 1882, ch. 389, Sec. 4 (22 Stat. 255): "No civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer or their employees, shall be employed * * * except for services actually render * * *"

the grounds that the term *officer* applied only to officers in the constitutional sense. The Court said:

> "A clerk of the collector is not an officer of the United States within the provisions of this section; and it is only to persons of that rank that the term public officer, as there used, applies. An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department. A person in the service of the Government who does not derive his position from one of these sources is not an officer of the United States in the sense of the Constitution. This subject was considered and determined in *United States* v. *Germaine*, 99 U. S. 508; and in the recent case of *United States* v. *Mouat*, 124 U. S. 303. (124 U. S. 525 at p. 532.)

In the only case prior to 1898 giving the term "officer" a broader meaning, *United States* v. *Hendee*, 124 U. S. 309, there was a clear intention by Congress to use the term in other than its constitutional meaning. In that case, plaintiff sued for pay benefits under a statute providing that "officers of the Navy" shall be credited with time "served as officers *or enlisted men*", the court held that time served by plaintiff as a paymaster's clerk should be included, on the ground that

> "the expression '*officers or enlisted men*' is not to be construed distributively as requiring that a person should be an enlisted man, or an officer nominated and appointed by the President, or by the Head of a Department, but that it was intended to cover all men in service, either by enlistment or regular appointment * * * ". (124 U. S. 309 at p. 313.)

In reaching this result, the court recognized that *normally* the term "officer" would be construed in its constitutional meaning, and a month later so construed a criminal statute in *United States* v. *Smith*, *supra*.

(b) *Nothing in the legislative history of the Act of June 27, 1898, required giving the words "officers of the United States" a scope broader than their usual meaning.*

The legislative history of the Act of June 27, 1898, while inconclusive, indicates, if anything, that the jurisdiction of the district court was being removed only as to the claims of officers in the constitutional sense adopted in the *Mouat, Germaine* and *Smith* cases, *supra.*

The chief occasion for the Amendment appears to have been difficulties encountered in enforcing the Act of July 1, 1894, Ch. 174, Sec. 2, of the Laws of the 53rd Congress (28 Stat. 162, 205), which provided:

> "No person who holds an office the salary or annual compensation attached to which amounts to the sum of $2,500 shall be appointed to or hold other office to which compensation is attached unless specifically heretofore or hereafter specifically authorized thereto by law."

This provision has been to some extent thwarted by the practice, described in the House debate on the proposed 1898 amendment to the Tucker Act, as follows:

> "Under the law of July 31, 1894, it is provided that no person who holds a $2,500 office can hold another compensated office under the United States. Now in a district * * * a person holds the office of clerk of the Court of Appeals and the same person holds the office of clerk of the Circuit Court of the United States, each of them paying a salary amounting to or exceeding $2,500. This person draws, in the regular way, his salary of $2,500 for one of the offices. Then he brings suit against the United States every quarter for a sum less than $1,000. Sometimes the cases are not properly defended, the department here having no notice of them. This man obtains a judgment for less than $1,000 every three months from which judgment there

is no appeal to the Supreme Court. Thus, he violates the law of 1894 and draws the pay of two officers, each of them exceeding $2,500."[4]

This practice was cited as the dominant reason for the amendment in the report of the House Judiciary Committee.[5] So eager was the Treasury Department, which was promoting the legislation, to reduce the prosecution of these and perhaps other illegal claims to uniformity that the bill, as introduced, proposed to withdraw completely the jurisdiction of the district courts over claims against the United States, by repealing Section 2 of the Tucker Act in its entirety.[6] The House Judiciary Committee, however, reported the bill back to the House, recommending that jurisdiction of the district courts be withdrawn only as to compensation claims of "officers of the United States".[7]

This appears to be the explanation of why Congress in this amendment confined to a single forum, not the claims of *all* federal employees, but only the claims of "officers of the United States", who in those days of modest salaries, were the very persons on the federal payroll who came within the $2,500 ban of the Act of July 1, 1894.

It must be recalled that this Act of 1894 was primarily an appropriation act. Its prohibition against the drawing of double salaries can thus be read in context with the rest of the Act, thereby removing any doubt as to the classes or categories of public servants to which it was intended to apply. Significantly, the line of demarcation drawn at the $2,500 level actually divided the great mass of Government employees *at that time* from those who would

[4] Mr. Updegraff, in presenting the 1898 amendment to the House. Cong. Rec. 55th Cong., 2nd Sess., p. 1731.

[5] H. R. Rep. No. 325, 55th Cong., 2d Sess.

[6] Cong. Rec. 55th Cong., 2nd Sess., p. 1731.

[7] *Ibid*, p. 1782.

normally have been considered to be "officers of the United States", in the constitutional sense.[8]

It would thus seem that the purpose of the 1898 amendment was to oust the district courts of jurisdiction only as to suits for compensation brought by the higher paid Government servants, leaving intact their original Tucker Act jurisdiction over similar claims of its more humble personnel. If this was the legislative objective, then the use of the narrow term "officers of the United States" was appropriate to effect the desired result.

In any event, there is certainly no such affirmative expression of a desire to cover all federal employees so as to justify reading the term "officers of the United States" in a sense other than the one adopted by this Court in its prior decisions (discussed in (a) above) *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 115.

(c) Virtually every case construing the Act of June 27, 1898, has interpreted the term "officer of the United States" as meaning an officer in the constitutional sense of the term.

Beginning with *United States* v. *McCrory*, 91 Fed. 295, decided within a year after the amendment of 1898, virtu-

[8] The following examples are sufficient to illustrate the point:

Salaries in the Department of State. Secretary of State, $8,000; First Assistant Secretary of State, $4,500; Second and Third Assistant Secretaries of State, $3,500; Chief Clerk, $2,500. All other salaries were under $2,500.

Salaries in the War Department. Secretary of War, $8,000; Assistant Secretary of War, $4,500; Chief Clerk, $2,500. All other salaries under $2,500.

The appropriations for the Office of Architect of the Capitol (28 Stat. at p. 197), Office of the Director of the Geological Survey (*Ibid*) and the Post Office Department (28 Stat. at p. 199) all reflect the same pattern of an administrative official with a salary in excess of $2,500, and skilled, fiscal or clerical help with salaries below that figure.

The groups holding positions in the War Department analogous to those of these plaintiffs were, for illustration, as follows: Captain of the Watch, $1,200; Lieutenants of the Watch, $840 each; 28 Firemen, $720 each.

ally every district and circuit court which has construed the amendment has agreed that its provisions applied only to "constitutional officers." The only divergence of viewpoint has been in ascertaining the precise scope of the concept of a "constitutional officer."

Petitioner has rather fully discussed the various cases on Pages 11 through 13 of his brief. An excellent summary of the cases will also be found in *Cain* v. *United States*, 73 F. Supp. 1019, 1020.[9]

Even the Court of Appeals for the Fifth Circuit, in *Kennedy* v. *United States*, 146 F. 2d 26, quoted with approval its prior opinion in *United States* v. *McCrary*, *supra*, that only a person appointed in the constitutional mode was "an officer of the United States" within the meaning of the 1898 Amendment. The court departed from earlier decisions only in its apparent holding that an appointment pursuant to a delegation of authority was tantamount to an appointment by the head of a department himself, and in ignoring the requirement in *Burnap* v.

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[9] "The courts seem universally to have held that the limitation of jurisdiction under the Tucker Act applies to those claimants who are 'officers of the United States' within the meaning of Article 2, Section 2, Clause 2 of the Constitution of the United States."

See also, *Brooks* v. *United States*, 36 F. Supp., 68, 69 (D. C. N. Y., 1939), the only opinion on this question which evidences any consideration of the legislative history of this amendment, where the court said:

> "It is most improbable that, with a well accepted constitutional meaning of 'officers of the United States'; Congress ever intended a different meaning to that phrase which would permit varying departmental meanings of the word 'officer' to affect the meaning of a statute of general application. Wherever the courts have departed from the constitutional meaning of the words, they have done so only because the clear meaning of the statute was the impelling force in reaching a broader definition, or because the words in question were 'officer', 'civil officer,' etc., and not 'officer of the United States.' Viewed against this background, all of the cases cited by the government are readily distinguishable."

United States, 252 U. S. 512, that the position to which the appointment was made had to be created by a specific act of Congress.

(d) Congress must be presumed to have adopted the previous judicial interpretation of the Act of June 27, 1898, when, in the 1948 revision of the Code of Civil Procedure, it retained the identical phraseology of "officers of the United States."

Under the doctrine of *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, Congress must be presumed to have used the term "officers of the United States" in the 1948 revision of 28 U. S. C. 1346(d)(2) in the accepted meaning of that phrase as adopted by the courts both *before* and *after* the 1898 amendment.

This inference is especially compelling since, in contemporaneous revisions of the Criminal Code, as to which a similar problem had arisen, it amended the phrase "officers of the United States" to read "officers *or employees* of the United States" and "office" to "office or place."

Thus, in the 1948 Revision of the Criminal Code, old 18 U. S. C. 149, 150 and 151, which had punished the solicitation of money for the procurement of an appointive "office", was revised to read "office or place" in Revised 18 U. S. C. 214 and 215. The Revisers' Note states that this was "to give broader scope to the section." Likewise, old 18 U. S. C. 202 prohibiting the procurement of contracts by any "officer or agent" was revised to read "officer, *employee*, or agent", in Revised 18 U. S. C. 216. The Revisers' Note states that this change was for the purpose of "clarifying scope of section." 18 U. S. C. Congressional Service (Temp. Ed., 1948, West Pub. Co.) p. 2465.

Similarly, former 18 U. S. C. 91 and 207 covering bribery of any "officer" was revised to read "officer or employee" in Revised 18 U. S. C. 201; former 18 U. S. C. 198, prohibiting the prosecution of claims by "an officer" was

revised to cover "an officer or employee" in Revised 18 U. S. C. 283; former 18 U. S. C. 183 prohibiting embezzlement by "any officer or assistant to such officer" was revised to read "an officer or employee" in Revised 18 U. S. C. 654; the Revisers' Note again stating that the change was in order to "clarify scope of section." (*Ibid.* at p. 2509.)

These changes in the criminal code, in contrast to the continued reference in 28 U. S. C. 1346(d)(2) only to "officers", reinforces the usual presumption that "the re-enactment without change of phraseology, by implication, carried the previous interpretation and practice with it." *Keck* v. *United States*, 172 U. S. 434, 457.

II.

THE ACCEPTED TESTS OF WHETHER A PARTICULAR CIVIL SERVANT IS AN OFFICER IN THE CONSTITUTIONAL SENSE ARE (*a*) WHETHER CONGRESS PROVIDED THAT HE BE APPOINTED BY THE PRESIDENT, A HEAD OF A DEPARTMENT, OR A COURT OF LAW, AND (*b*) WHETHER THE POSITION TO WHICH HE IS APPOINTED WAS SPECIFICALLY CREATED BY STATUTE. UNDER EITHER OF THESE TESTS, PETITIONER WAS NOT AN OFFICER IN THE CONSTITUTIONAL SENSE.

In determining who is an officer in the constitutional sense, in construing 28 U. S. C. 1346(d)(2) and other statutes, the courts have not attempted to draw the line on the basis of the importance of the duties to be performed or the qualifications of the employee. Instead, they have accepted either

(*a*) the decision of Congress to vest the appointive power in subordinate officials (*United States* v. *Germaine*, 99 U. S. 508; *United States* v. *Smith*, 124 U. S. 525);[10] or

(*b*) the failure of Congress to specifically create the position to which the person is appointed (*Burnap* v.

[10] Discussed *supra* at pp. 10 through 13.

United States, 252 U. S. 512; *Martin* v. *United States*, 168 Fed. 198; *Cain* v. *United States*, 73 F. Supp. 1019; *Beal* v. *United States*, 182 F. 2d 565).[10a]

as a conclusive legislative determination that the appointee was not an officer in the constitutional sense.

These tests have been so consistently recognized and applied in construing the 1898 Amendment to the Tucker Act, that they must be deemed to have been adopted by Congress in the successive codification of 1911 and 1948 (discussed *supra*, pages 18, 19).

There remains the question of whether petitioner is an officer under either of these established criteria.

> *(a) For the purpose of determining who is an officer of the United States, an appointment by delegation from the Head of a Department is not tantamount to an appointment by the Head of Department himself.*

There is, of course, no issue here as to the practical need for permitting heads of departments to delegate to subordinates in the field the authority to appoint minor civil service employees, or the practical impossibility of Congress specifically creating all the hundreds of thousands of minor positions in the civil service.

These two practical problems are, however, no new development. 5 U. S. C. 43, under which petitioner was hired, originally appeared as § 169 of the Revised Statutes of 1873, which gave the head of each department omnibus authority:

> "to employ . . . such number of clerks of the several classes recognized by law, and such messengers, assistant messengers, copyists, watchmen, laborers and *other employees;* and at such rates of compensation, as may be appropriated for by Congress from year to year."

[10a] Discussed *infra* at pp. 22 through 26.

and delegations of the appointing power over minor employees have been long exercised and permitted. See *United States* v. *Mouat*, 124 U. S. 303; *Morrison* v. *United States*, 40 F. 2d 286 (D. C. N. Y. 1930); *Brooks* v. *United States*, 33 F. Supp. 68.

The issue, in short, is not the broad practical impossibility of Congress specifically creating every position, no matter how minor, nor the practical need for delegating the appointing power to such positions, but rather "a technical rule of procedure to be applied as such" (Cf. *Ayrshire Collieries Corp.* v. *United States*, 331 U. S. 132, 136) namely, whether employees who are appointed by subordinate officials to positions not specifically created by Congress, are excluded from suing in the district courts as "officers of the United States."

Here, the petitioner was admittedly not appointed by the head of his department, nor even by an immediate assistant or bureau head. He was appointed by a commanding officer in the field.

The Court below presumably thought that, on some principle akin to the law of agency, the appointment, being under a delegation of authority *from* the Head of department was action *by* the Head of the department. But, for purposes of deciding who is an "officer of the United States", there is no rational basis for distinguishing a *direct* delegation by Congress of appointing power to a subordinate official from an *indirect* delegation to the same official through the department head. In both cases, we have the judgment of Congress that the position was not of such importance as to justify requiring appointments thereto to be made by the department head.

It is no answer to argue that, because a department head can instruct and supervise the subordinate to whom he delegates appointive power, such subordinate is really his alter ego and an appointment made by the subordinate thus becomes the act of the department head. For the

department head has the same power to instruct and supervise a subordinate to whom Congress directly delegates an appointive power, and that power of supervision, even *when actually exercised*, has consistently been held insufficient to constitute the appointee an officer.[11]

Accordingly, the courts have correctly treated both situations alike, and held that persons appointed by subordinates under delegation from department heads are in the same category as appointees under direct delegation from Congress, and are not officers in the constitutional sense.[12]

Thus, under the first test—viz., whether his appointment was required by Congress to be made by the Head of his department—petitioner was clearly not "an officer of the United States."

(b) There was no statute specifically creating the office to which petitioner was appointed.

The Court of Appeals for the Sixth Circuit, in *Beal* v. *United States*, 182 F. 2d 565, deemed it unnecessary to consider the first test (discussed in *(a)* above), holding that regardless of how the appointive power was vested, plaintiffs, there, were not "officers" of the United States since there was no statute specifically creating their positions.

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[11] Thus in *United States* v. *Mouat*, a clerk appointed by a paymaster was held not an officer even though the appointee was actually approved by the Secretary of the Navy, since "there was no act requiring his approval of such an appointment", 124 U. S. 303 at pp. 307, 308. So, in *United States* v. *Smith*, a customs clerk appointed by a collector was held not an officer even though the appointment was approved by the Secretary of the Treasury because "no law *required* such approbation", 124 U. S. 525, at p. 533. And, in *Burnap* v. *United States*, infra, the Court held that a landscape architect actually appointed by the Secretary of War was not an officer when the appointive power was vested by Congress in the Chief of Engineers, 252 U. S. 512, at pp. 515, 516 and 518.

[12] *Morrison* v. *United States*, 40 F. 2d 286; *Brooks* v. *United States*, 33 F. Supp. 68; *Beal* v. *United States*, 182 F. 2d 565.

The plaintiffs in the Beal case, like the petitioner here, were appointed under the omnibus authority of 5 USCA 43, which, for convenience, we here repeat in full: (5 USCA, 1949 Cum. Supp., p. 24)

> "*Employment of clerks, and other employees; authority; place of service; delegation of authority to employ.* There is authorized to be employed in each executive department, independent establishment, and the municipal government of the District of Columbia, for services in the District of Columbia or elsewhere, such number of employees of the various classes recognized by sections 661-663, 664-669, 670-672, 673, and 674 of this title, as may be appropriated for by Congress from year to year: *Provided*, that the head of any department or independent establishment may delegate to subordinates, under such regulations as he may prescribe, the power to employ such persons for duty in the field services of his department or establishment."

Similarly, petitioner here, like the appellants in *Beal* v. *United States, supra,* was paid under the War Department Appropriation Acts which merely authorized lump sum expenditures for various purposes and made no specific provision for his particular wages as distinguished from those of the hundreds of thousands of other civilian employees of the department.[13] That Congress created no office of "firefighter" in any other legislation is evident from the fact that nowhere in the statutes are they referred to by name, nowhere are their duties prescribed and nowhere was any specific authorization made for their pay. Consequently, unless statutory "creation" of an office can be found in the two statutes above referred to (5 USCA

[13] The Military Appropriation Act of 1943 (P. L. 649-77th Cong.) provided the lump sum of $2,617,506,025 for a long list of Signal Corps requirements, including "salaries of civilian employees"; the Military Appropriation Act of 1944 (P. L. 108-78th Cong.) provided $4,646,169,000 for the same purposes.

43 and the Appropriations Acts) it will not be possible to classify petitioner as an "officer of the United States."

The question was considered in this light in the case of *Martin* v. *United States*, 168 Fed. 198 (CCA 8, 1908), in a long and well reasoned opinion by Judge Sanborn. Martin was a clerk working for the Commissioner to the Five Civilized Tribes; his appointment had been made in the lower echelons of the Department of the Interior, but approved by the Secretary. Subsequently he was tried and convicted of violating a statute which applied only to "Every officer . . ."

Martin's appointment had been made under an appropriations act, similar in effect to 5 USCA 43, *supra*, authorizing the employment by the Secretary of "all assistance necessary for the prompt and efficient performance" of the duties of the Indian commissioners. (Act of March 3, 1905, c. 1479, 33 Stat. 1060.) Considering the effect of this statute, Judge Sanborn said:

> ". . . when the Secretary of the Interior approved the defendant's employment in common with that of the other employes of the commissioner, he labored under no misapprehension, and did not undertake to create an office for the defendant or to approve his appointment to one . . .
>
> "And because the defendant's services were secured under authority granted to the Secretary to employ assistance, *because his position was never made office by law . . . the defendant was not an officer of the United States.*" (168 Fed. 198 at p. 203)

This doctrine was reaffirmed by this Court in *Burnap* v. *U. S.*, 252 U. S. 512.

Burnap was the only landscape architect in the Office of Public Buildings and Grounds, a War Department agency. Revised Statutes, § 169,[14] from which 5 USC 43 was de-

[14] The significant portion of the text of § 169, Rev. Stat., appears at page 20, *supra*.

rived, empowered all heads of departments to employ such personnel as might be appropriated for by Congress from year to year, and only in the appropriations acts covering Burnap's salary was there any recital of his position and the emolument assigned to it. The court held that this was not the equivalent of the statutory creation of an office:

> "There is no statute," said Justice Brandeis, "which *creates an office* of landscape architect in the Office of Public Buildings and Grounds. . . The only authority for the appointment or employment of a landscape architect in that office is the legislative and judicial appropriations act." (252 U. S., 512 at p. 517)

Burnap was held not to be an officer.

From the foregoing decisions, three propositions of law are clear:

1. No Federal position can rise to the dignity of an office unless there is a statute specifically creating that office;

2. An annual appropriations act which does not purport to create an office, but merely appropriates funds for a named position, will not constitute the incumbent of that position an officer in the constitutional sense;

3. *A fortiori*, a general appropriations act (such as is here involved) which merely appropriates lump sums for "civilian employees", without even referring to one or more specific positions, certainly cannot create an office in the constitutional sense.

This test was applied in construing the 1898 Amendment to the Tucker Act in *Cain* v. *United States*, 73 F. Supp. 1019. That was an action brought under the Tucker Act by a former secretary to Justice Minton. Citing the *Bur-*

nap case, the District Court held that it had jurisdiction, and said:

> "... before an 'officer' may be appointed, Congress must have, by specific legislation created such 'office' ...
>
> "In the instant case, the only authority for the appointment of secretaries to circuit and district judges is found in the annual appropriation acts passed by Congress, but these appropriation acts nowhere *create the office* of secretary to which this plaintiff might have been appointed and thus have become an 'officer of the United States.'" (73 F. Supp. 1019 at p. 102.)

This test was relied on by the Court of Appeals for the Sixth Circuit, in *Beal* v. *United States*, 182 F. 2d 565, and is, we believe, sound. Accordingly, the decision below was in error, even without regard to the first test discussed in part (a) above.

III.

EVEN ASIDE FROM THE ESTABLISHED TESTS, AND CONSIDERING THE NATURE OF HIS POSITION AND DUTIES, AND THE SCOPE OF HIS AUTHORITY, PETITIONER WAS CLEARLY NOT AN "OFFICER OF THE UNITED STATES" EITHER WITHIN ART. II, SEC. 2, CL. 2 OF THE CONSTITUTION, OR IN THE COMMONLY ACCEPTED MEANING OF THE TERM.

Except for the President and Vice-President, all members of the Civil Service of the Federal Government are appointive and fall into one of three categories: (1) Those who are appointed by the President "by and with the advice and consent of the Senate"; (2) "inferior officers" whose appointment Congress may vest by law "in the President alone, in the Courts of Law, or in the heads of departments" (Const. Art. II, Sec. 2, Cl. 2); and (3) *employees*, signifying all subordinate members of the Civil Service receiving appointment at the hands of officers who are not

specifically recognized by the Constitution as capable of being vested by Congress with the appointing power of "inferior officers". The first two categories are explicitly provided for in Art. II, Sec. 2, Cl. 2 of the Constitution. There is no explicit provision in the Constitution covering the third category of "employees" but, as already noted above, the validity of such appointments and the distinction between "officers" and other persons in Civil Service has been recognized by the Courts at least since 1879. *United States* v. *Germaine*, 99 U. S. 508; *United States* v. *Mouat*, 124 U. S. 303; *United States* v. *Smith*, 124 U. S. 525; *Burnap* v. *United States*, 252 U. S. 512.

The narrower question of who are "inferior officers" whose appointment Congress may not constitutionally delegate to any one other than the President, a department head or the Courts has, apparently, never been presented to the Courts. It does appear, however, that it would be unconstitutional (as well as most unlikely) for Congress to vest the appointment of major policy-making subordinates such as bureau chiefs, solicitors, assistant secretaries and the like, other than in the President or the heads of departments. This was the opinion of the Attorney General, who ruled that, because Inspectors of Customs and Assistant Assessors were "officers" in the constitutional sense, Congress was prohibited by the Constitution from vesting the power to appoint to these positions in anyone other than the President, the Courts or heads of departments and that statutes purporting so to delegate the appointive power were unconstitutinoal. 4 Op. Atty. Gen. 162 (1843); 11 Op. Atty. Gen. 209 (1865).

Similar was the view expressed in 13 Op. Atty. Gen. 516 (1871), in which the Attorney General ruled unconstitutional a proposed requirement that an examining board be empowered to designate the persons whom the department heads should appoint to fill *all* of the positions in the Civil Service, no matter how important, without even giving the department heads discretion to make their selections from a

panel of alternative nominees approved by the Board. The rationale of the Attorney General in that opinion would seem sound:

> "Viewing the appointive power conferred in the Constitution as a substantial and not merely a nominal function, I cannot but believe that the judgment and will of the constitutional depository of that power should be exercised in every appointment. The power was lodged where it was, because the makers of the Constitution, after careful consideration, thought that *in no other depositaries of it could the judgment and the will to make proper appointments be found * * * the first need of the head of a Department is a body of capable and trusty assistants; therefore Congress may vest appointments in the heads of Departments* * * *." (13 Op. Atty. Gen., 516 at p. 519.)

The corollary and converse of this principle is that Congress *may* constitutionally vest in subordinates the appointment of minor civil servants whose limited functions clearly place them outside the concept of an "officer" in the constitutional sense. Thus, in *Krichman* v. *United States*, 256 U. S. 363, the Court reversed the conviction of a baggage porter of a railroad being operated by the United States for bribery under Sec. 39 of the Criminal Code (35 Stat. 1096), holding that he was neither an "officer of the United States" nor acting in an "official function". In his opinion, Mr. Justice Day remarked:

> "Not every person performing any service for the government, however humble, is embraced within the terms of the statute." (256 U. S. 363, at p. 366.)

For, said he, if the broad interpretation urged by the government were adopted:

> "Window cleaners, scrub women, elevator boys, door keepers, pages—in short, anyone employed by the United States to do anything—is included." (*Ibid*)

Although these comments were addressed to the meaning of the terms "officers" or persons performing "official functions" in a criminal statute, they would seem *a fortiori* relevant to the issue of who, in terms of the nature of their position and duties, are "inferior officers", within the meaning of Art. II, Sec. 2, Cl. 2 of the Constitution, so as to require their appointment by the President, the courts of law, or the heads of departments.

Viewed from this standpoint, the line between "officers" and employees becomes, of necessity, vague. In one of the few cases so considering the problem Judge Sanborn observed:

> "The line which separates officers from employees is shadowy, and possibly not susceptible of precise definition, but there are persons who are readily recognized as officers of the United States, and others who are easily perceived to be employees and not to be officers. The classes have certain characteristics which may well be considered in assigning any person to his proper class. *Greater importance, dignity, and independence mark the position of an officer than that of an employee.* The clerkship of the defendant was not characterized by much more importance, dignity or independence than the positions of the stenographers or the janitors or the other employees about him." (*Martin* v. *United States*, 168 Fed. 198, at p. 201.)

The duties of petitioner here were the circumscribed ones of responding to fire calls, extinguishing fires, cleaning fire-fighting equipment, and the like. Certainly, regardless of where the line may theoretically be drawn between "officers" and other employees, there can be little question that, even if the traditional tests discussed in (a) and (b) above were ignored, petitioner was not performing policy making, administrative or executive duties of such significance that Congress could not properly vest his appointment in a subordinate official and that, in the commonly accepted meaning of the term, as well as in the constitutional sense,

he could not be considered an "officer" of the Federal government.

IV.

SEC. 50(b) OF PUBLIC LAW IS NOT APPLICABLE TO THIS OR OTHER PENDING ACTIONS.

To apply Sec. 50 of Pub. Law 248 (65 Stat. 727) to cases already pending in the District Courts, or which, as here, are still to be tried, if remanded, would cause obvious hardships. Those plaintiffs, as to whom the statute of limitations has not yet run, would be compelled to start afresh in the Court of Claims; and the efforts, time and costs to parties, witnesses and the District Courts themselves would all have been wasted. Other plaintiffs, such as petitioner, as to whom the statute of limitations has now run, would be left with no forum whatever for the enforcement of rights otherwise within the scope of the Fifth Amendment. Cf. *Lynch* v. *United States*, 292 U. S. 571, 579; and *Duke Power Co.* v. *Tax Commission*, 81 F. 2d 513 (CCA 4).

An intention so to penalize claimants should not be ascribed to Congress unless it can be found in the legislative history or in unequivocal language in the statute.

As stated by *Lord Esher, M. R.*, in *Plumstead Board of Works* v. *Spackman*, L. R. 13 Q. B. 878, 887, approved and cited by this Court in *Sorrells* v. *United States*, 287 U. S. 435, 448, Note 7:

> "If there are no means of avoiding such an interpretation of the statute", (as will amount to a great hardship,) "a judge must come to the conclusion that the legislature *by inadvertence has committed an act of legislative injustice;* but to my mind a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an act of Parliament; and, *unless he is forced to come to a contrary conclusion,* he ought to assume that it is impossible that the legislature could have so intended."

(a) Even procedural statutes will not be applied to pending cases, so as to create unconstitutional or harsh results, unless such application is explicitly provided or necessarily implied.

In situations comparable to the present case, this Court has adopted the principle that amendatory statutes will not be construed as affecting pending cases (where this will impute to the legislature an intention to cause unconstitutional or harsh results) unless the wording of the statute *unequivocally* commands that construction, or that construction is *necessarily* implied from its legislative history or otherwise.

As this Court said in the *Twenty Per Cent Cases*, 87 U. S. (20 Wall.) 179, 187:

> "* * * no statute, *however positive its terms*, is to be construed as designed to interfere with existing contracts, rights of action, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied."

This principle has been applied not merely to statutes affecting substantive law[15] but also *to statutes governing procedure.*[16]

In *United States* v. *St. Louis, San Francisco, and Texas Ry. Co.*, 270 U. S. 1, the issue was whether a statute of limitations, *which had no saving clause*, should be applied retroactively to bar causes of action existing at the time of its passage. The Transportation Act 1920, Ch. 91 (41 Stat. 456) created a new three-year limitation period for actions previously subject only to a six-year period of limitations:

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[15] *Chew Heon* v. *United States*, 112 U. S. 536, 559; *Shwab* v. *Doyle*, 258 U. S. 529, 534; *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160, 162, 163.

[16] *United States Fidelity and G. Co.* v. *United States*, 209 U. S. 306; *Fullerton-Krueger Lumber Co.* v. *Northern Pac. Ry. Co.*, 266 U. S. 435; and compare *Sohn* v. *Waterson*, 84 U. S. (17 Wall.) 596, and *Herrick* v. *Boquillas Land & Cattle Co.*, 200 U. S. 96, construing state statutes of limitations.

> "*All* actions at law by carriers * * * shall be begun within three years from the time the cause of action accrues and not after."

Plaintiffs had commenced suits against the government in the Court of Claims within six years, but more than three years, after the accrual of their causes of action and over three years after the passage of the 1920 statute. The government contended that under the all-inclusive wording of the 1920 statute, the new limitation period applied to claims which had arisen prior to its enactment. In rejecting this contention, this Court cited the general principle against applying statutes to cases pending at the time of their enactment, and said:

> "There is nothing in the langauge of [the new statute of limitations] or in any other provision of the act or its history, *which requires* us to hold that the three-year limitation applies, under any circumstances, to causes of action existing at the date of the act." (270 U. S. 1 at p. 3.)

This decision is controlling here, unless either the legislative history or the express language of Sec. 50 of Public Law 248 compels the Court to apply its provisions to pending cases.

(b) The legislative history of Section 50, Public Law 248, contains nothing requiring this Court to apply its provisions to pending cases, merely because of the absence of an explicit saving clause.

Normally, the absence of a saving clause raises an inference that a statute such as this was affirmatively intended to withdraw jurisdiction as to pending as well as to future actions. Cf. *Gates* v. *Osborn*, 76 U. S. (9 Wall.) 567. Here, the legislative history of Public Law 248 rebuts any such inference.

The legislative history of Sec. 50 of Public Law 248 is quite meager. No hearings were held on the bill (H. R.

3899), nor does it appear on whose recommendation the amendment to § 1346(d)(2) was included in Sec. 50(b). As to other amendments to the Judicial Code contained in the bill, recommendations had been made by the Committee on Revision of Criminal and Judicial Codes of the Judicial Conference of the United States and approved by that Conference. (H. R. Rep't. No. 462, 82d Cong., 1st Sess., May 15, 1951, pp. 10, 11, 15, discussing Sections 36, 39 and 52 of the H. R. 3899.)

Whether or not the Attorney General requested or reported on the amendment does not appear, but if he did, it does not affirmatively appear that the Committees were given to understand that the amendment represented a change in existing law which, if applied to pending litigation, would compel some litigants to start afresh in the Court of Claims and leave others with no forum whatever for enforcing rights otherwise within the scope of the Fifth Amendment. To the contrary, the House Report (No. 462, p. 14) and the Senate Report (No. 1030, p. 16) state merely that the amendment was intended

> "to make it *more clearly appear* that the jurisdiction of the district courts does not include actions or claims for fees, salary, or compensation of federal officers or employees,"

and the only floor discussion of the bill consisted entirely of the following colloquy:

> "Mr. Reed of Illinois. Mr. Speaker, reserving to object, am I correct in understanding that this bill *is merely clarifying and corrective* as to certain titles of the code, and *that in only one instance is there any substantive law involved*, and that is, as I recall, where an appeal is permitted from the District Court of Guam to the Ninth Circuit?
>
> Mr. Bryson (Floor Leader of the bill). That is true.
>
> Mr. Reed of Illinois. Mr. Speaker, I withdraw my reservation of objection." (Cong. Rec., 82d Cong., 1st Sess., 13945, 13946.)

From this legislative history it is clear that there was no affirmative expression of any expectation that a change of law was involved which, if applied to pending cases, would require some litigants to start afresh in the Court of Claims and leave others with no forum at all. The section was considered as merely "clarifying and corrective." Accordingly, there was no occasion for including, or considering the inclusion of, a saving clause, and hence, no inference can properly be drawn that, merely because no saving clause was included, Congress must affirmatively have intended to affect pending litigation.

The remaining question is whether, despite the foregoing legislative history, the language of Public Law 248 is *so unequivocal* as to *require* that the amendment be applied to pending actions.

(c) The language of Section 50(b), Public Law 248, does not unequivocally refer to pending actions.

The remaining question is whether a congressional intent to apply Sec. 50 of Public Law 248 to pending as well as to future actions must be implied from the use of the adjective "any" which modifies the noun "actions". Such universals as "any" will not, however, be given their all-inclusive meaning where the result is inequitable (*Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 287), unconstitutional (*Sohn* v. *Waterson*, 84 U. S. (17 Wall.) 596, 599) or otherwise unjust. (See cases cited *infra* notes 16, 17, 18 and 19). Especially is this true where, as here, to do so would cause conflict with the rule which raises a presumption against applying procedural statutes to cases already pending at the time of their enactment.

In this respect, the present case is indistinguishable from *United States* v. *St. Louis, San Francisco & Texas Railway Co., supra*. Here, the statute as amended purports, without any saving clause, to deny jurisdiction to the District Courts:

"of * * * *any* action or claim to recover compensation by * * * employees."

There, the statute, without any saving clause, imposed a three-year limitation on:

"*all* actions at law by carriers."

Thus both cases come within the settled principle that words such as "any",[17] "all,[18] "every,[19] etc.,[20] are not to be given universal scope where a more limited interpretation will avoid imputing to Congress an intention to create unconstitutional or patently unjust consequences.

(d) Other cases distinguished.

The government will doubtless[21] rely on either such decisions as *Carpenter* v. *Wabash Railway Co.*, 309 U. S. 23, and *Seese et al.* v. *Bethlehem Steel Co.*, 168 F. 2d 58 (CCA , 1948) or the line of cases represented by *United States* v. *Schooner Peggy*, 5 U. S. (1 Cranch.) 103; *Ex parte McCardle*, 74 U. S. (7 Wall.) 506; and *Smallwood* v. *Gallardo*, 275 U. S. 56.

In the first group of cases, the statutes explicitly purported to apply to pending suits. Thus, in *Carpenter* v. *Wabash Railway Co.*, *supra*, a statute giving priority to

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[17] "any", *United States* v. *Palmer*, 16 U. S. (3 Wheat.) 610 *United States* v. *Kirby*, 74 U. S. (7 Wall.) 482, 486; *Richardson* v. *Ainsa*, 218 U. S. 289, 297; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 402; *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 627.

[18] "all", *Jacobson* v. *Massachusetts*, 197 U. S. 11, 39; *Sohn* v. *Waterson*, supra.

[19] "*every*", *Lau Ou Bew* v. *United States*, 144 U. S. 47; *Foley Bros, Inc.* v. *Filardo*, *supra*.

[20] "of any kind", *Church of the Holy Trinity* v. *United States*, 143 U. S. 447, 462; "any thing else", *United States* v. *Graf Distilling Co.*, 208 U. S. 198; "whoever", *Baender* v. *Barnett*, 255 U. S. 224, 226.

[21] These cases were cited in the brief recently filed by the government in its appeal in United States v. Beal now pending in the Court of Appeals for the Sixth Circuit.

personal injury claims was applied to a pending reorganization proceeding because its provisions explicitly applied to any proceedings "now or hereafter pending in any court". Similarly, in *Seese et al.* v. *Bethlehem Steel Co., supra*, the statute withdrawing jurisdiction of the federal courts over portal to portal pay claims explicitly applied to any action "whether instituted *prior to, on or after* May 14, 1947".

In the second group of cases, the statute, though not explicitly referring to pending suits, was applied to them in order to effectuate what the court found to be the objective of Congress. Thus, in *United States* v. *Schooner Peggy supra*, a prize court condemnation was dismissed because of a subsequent Treaty calling for the restoration of captured property "not yet definitely condemned", the court finding that such dismissal was required in the national interest to further the "manifest purposes of the Treaty". So, in *Ex parte McCardle*, 74 U. S. (7 Wall.) 506, this court found that the Act repealing its appellate jurisdiction over habeas corpus proceedings was intended to be comprehensive and to include appeals already filed.

Smallwood v. *Gallardo, supra*, held that a pending equity suit, to enjoin the collection of taxes by the Puerto Rico government, should be dismissed because of a later Act of Congress prohibiting any such suit from being "maintained". In so ruling, the Court emphasized that such construction would

> "carry out the policy that it embodies of preventing the Island from having its revenue held up by injunction; a policy no less applicable to these suits than to those begun at a later day. * * *" (275 U. S. 56, at p. 61.)

The Court added that this result

> "does not leave the taxpayer without power to resist an unlawful tax, whatever the difficulties in the way of resisting it." (*Ibid* at p. 62.)

No such policy considerations are apparent in the case at bar.

The government, in its recent brief in Court of Appeals for the Sixth Circuit, also relies on *United States v. McCrory*, 91 Fed. 295, which construed the 1898 Amendment as applying to pending actions despite any explicit language in the statute requiring such application.

That decision, we submit, was questionable in the light of the rule of construction followed in *United States* v *St. Louis, San Francisco and Texas Ry. Co., supra.* Indeed, the net effect of *United States* v. *McCrory* was needlessly to compel Congress to pass a remedial statute (Act of February 26, 1900, c. 25, 31 Stat. 33) specifically preserving suits when the 1898 Amendment was passed, thus specifying the intention not to affect pending cases which the Courts could—and should—have assumed as a matter of statutory construction. The debates on this amendment demonstrate the wisdom of not construing amendments, such as these, so as to apply to pending cases in the absence of a clear indication of such legislative intention on the part of Congress.[22]

But, even if *U. S.* v. *McCrory* was correctly decided, the present case is distinguishable. Here, the legislative history is such that no inference can be drawn, as might have

[22] Mr. Ray, the Floor Leader of the bill, H. R. 5493, stated: "In 1898 we passed a bill taking jurisdiction from the circuit and district court of certain claims against the government * * * and relegating all such claims to the Court of Claims. In doing so *we had no purpose to abate or discontinue pending suits* where the claimants had already gone into court, filed their bills and commenced their actions, and in some cases had obtained judgment." (Cong. Rec. 56th Cong., 1st Sess., p. 1017.)

In reporting favorably on the bill, the Attorney General pointed out that, as here, "some claimants were left remediless, being barred by the statute of limitations from beginning their actions anew in the Court of Claims" and added, "As it was *undoubtedly not the intention* of Congress that the results above enumerated should follow from the passage of the Act of June 27, 1898, it seems to me that the bill under consideration is manifestly just." (H. R. Rept. No. 72, 56th Cong., 1st Sess.)

been under the 1878 Amendment, that the absence of a saving clause implies an affirmative intent to cover all situations within the literal scope of the statute. (See pp. 32, 33, 34, *supra*.)

We submit, therefore, that this case comes squarely within the rationale of *United States* v. *St. Louis, San Francisco and Texas Ry. Co., supra*, and that Sec. 50(b) of Pub. Law 248, despite the absence of a saving clause, is not to be construed as affecting this or other pending cases. A court should always be loath to assume that "the legislature by inadvertence has committed an act of legislative injustice". *Plumstead Board of Works* v. *Spackman, supra*.

CONCLUSION.

For the reasons set forth above, we submit that the decision below should be reversed with instructions to direct the District Court to overrule the Respondent's Motion to Dismiss.

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